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## REGULATED INDUSTRIES—STATUTORY CONSTRUCTION OF SECTION 541(a) OF THE CABLE TELEVISION CONSUMER PROTECTION AND COMPETITION ACT OF 1992: A PRESUMPTION IN FAVOR OF PRACTICAL REASON

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# NOTES

## REGULATED INDUSTRIES—STATUTORY CONSTRUCTION OF SECTION 541(a) OF THE CABLE TELEVISION CONSUMER PROTECTION AND COMPETITION ACT OF 1992: A PRESUMPTION IN FAVOR OF PRACTICAL REASON

### INTRODUCTION

During the 1970s, cable television providers and policymakers generally perceived the developing cable television industry to be a natural monopoly, analogous to a public utility.<sup>1</sup> As a result, municipal authorities typically granted exclusive franchises to cable providers.<sup>2</sup> Consistent with the traditional treatment of public utilities, the cable industry was regulated by both the Federal Communications Commission (FCC) and state and local governments to counter the absence of competition faced by these exclusive franchises.<sup>3</sup> Thus, regulation displaced competition while similarly protecting consumer interests. The public utility model of cable regulation changed, however, in 1984 when Congress essentially deregulated the cable industry for the purpose of promoting the industry's growth.<sup>4</sup> The deregulation of the cable industry left a large number of cable providers operating under existing exclusive franchise agreements. These cable providers were in effect left in control of unregulated monopolies. By the 1990s, Congress had concluded that the market power exercised by cable franchises was no longer benign and was actually injuring consumer interests.<sup>5</sup>

In 1992, Congress responded to these conditions in the cable industry with the Cable Television Consumer Protection and Competition Act of 1992 (the "Act").<sup>6</sup> Congress designed the Act to

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1. See *infra* note 15 and accompanying text.

2. See *infra* note 27 and accompanying text.

3. See *infra* part I.A.2.

4. See *infra* part I.A.3.

5. S. REP. NO. 92, 102d Cong., 2d Sess. 8-10 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1143.

6. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 102 Stat. 1374 (codified as amended in scattered sections of 47 U.S.C.).

promote consumer interests, in part by facilitating managed competition in the cable industry. Accordingly, section 541(a) of the Act prohibits cable franchising authorities, typically local governments, from granting exclusive franchises<sup>7</sup> and from "unreasonably" refusing to grant subsequent franchises.<sup>8</sup> Unfortunately, section 541(a) of the Act does not explain whether it is "unreasonable" for a franchising authority to refuse to grant a second franchise to a cable provider on the grounds that the authority has already granted an exclusive franchise. In other words, Congress failed to expressly state whether section 541(a) may be applied retroactively to negate the exclusivity of preexisting franchises.

Two federal courts of appeals have reached opposite conclusions on this issue. The United States Court of Appeals for the Eleventh Circuit, in *Cox Cable Communications, Inc. v. United States*,<sup>9</sup> decided that section 541(a) required negation of the exclusivity provision of a preexisting franchise when a qualified second franchisee applied for a franchise. The United States Court of Appeals for the Sixth Circuit, in *James Cable Partners v. City of Jamestown*,<sup>10</sup> disagreed with *Cox*. The court in *James Cable* based its opinion primarily on *Landgraf v. USI Film Products*,<sup>11</sup> an employment discrimination case decided by the Supreme Court after *Cox*, that established a test for whether a statute applies retroactively. Relying on *Landgraf*, the court in *James Cable* held that section 541(a) does not negate the exclusivity of preexisting franchise agreements.<sup>12</sup> In reaching this conclusion, the court interpreted the statute in light of the *Landgraf* presumption against retroactivity.<sup>13</sup>

This Note asserts that the *Cox* court essentially reached the correct result in holding that section 541(a) may negate the exclusivity of preexisting franchise agreements when a qualified applicant applies for a second franchise.<sup>14</sup> It criticizes the use of the *Landgraf* test as applied to the cable situation for being too narrow

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7. In the cable industry, an exclusive franchise is an agreement by which a cable provider is licensed by a state or local government to be the only provider of cable television services within the prescribed area.

8. 47 U.S.C. § 541(a) (1994). The effect of a second franchise would mean that an additional cable provider would offer cable services to the consumers in the prescribed area. See *infra* note 69 for the text of § 541(a)(1).

9. 992 F.2d 1178 (11th Cir. 1993).

10. 43 F.3d 277 (6th Cir. 1995).

11. 114 S. Ct. 1483 (1994). See discussion *infra* part II.

12. *James Cable*, 43 F.3d at 279.

13. *Id.*

14. *Cox Cable Communications, Inc. v. United States*, 992 F.2d 1178, 1194 (11th Cir. 1993).

in scope and conclusory in analysis, and for basing its reasoning on a limited determination of congressional intent. As a consequence, the test fails to accurately discern whether applying a presumption against retroactivity to section 541(a) is correct under the circumstances, given the objectives of the legislation. This Note asserts that the *Landgraf* test for retroactivity is essentially the Supreme Court's method of justifying *post hoc* the Court's decision that was actually based on other reasons. The Note proposes an alternative method of determining retroactivity, based on "practical reason." It argues that this approach is more consistent with the actual judicial decision-making process, and is better suited to reaching an interpretation of the statute that comports with the objectives of the legislation. This Note concludes that, in light of the purpose of the 1992 Cable Act, as illustrated by the text and legislative history, the characteristics of the cable industry, and the effect of the 1984 Act on the industry, section 541(a) presumptively applies to preexisting exclusive franchises. In light of this presumption, whether the exclusivity of a particular franchise should be protected is determined on a case-by-case basis.

Part I of this Note provides a brief overview of the growth of the cable industry, the role of government in the industry, and a summary of the legislative history of the 1992 Cable Act. Part II discusses the *Landgraf* test for retroactivity. Part III examines the *Cox* and *James Cable* opinions and compares their reasoning to the *Landgraf* standard. Part IV explores the shortcomings of the *Landgraf* test for determining retroactivity, and proposes an alternative "practical reason" based method. Part V analyzes section 541(a) under the method proposed in Part IV.

## I. BACKGROUND

### A. *Factors Leading to the Enactment of the Cable Television Consumer Protection and Competition Act of 1992*

Regardless of whether cable television in fact possessed attributes of a natural monopoly, the cable industry developed in the form of a natural monopoly because government and cable firms perceived it as such, and therefore shaped it in that form. As a result, cable providers were granted exclusive franchises. Because competitive forces that typically protect consumer interests were thereby eliminated, these exclusive franchises were subjected to regulation. By the 1980s, the aggregate burden of regulation by local, state and federal governments had become an impediment to

the growth of the cable industry. Congress responded in 1984 with legislation that essentially deregulated the cable industry. However, cable providers retained their exclusive franchises. By the 1990s, policy makers, as well as consumers, perceived the market power possessed by the cable industry to be responsible for negative effects on consumer interests. In addition, observers began to question whether the cable television industry was indeed a natural monopoly. In 1992, Congress enacted legislation designed to advance consumer interests by facilitating managed competition in the cable industry.

### 1. Growth of the Cable Industry as a Natural Monopoly

Both cable providers and local and state governments perceived the cable television industry from its inception to exhibit characteristics of a natural monopoly.<sup>15</sup> Local and state governments maintained that cable installation was disruptive to the community.<sup>16</sup> They also asserted that the economies of scale in the cable industry were such that, even if cable providers were permitted to compete, only one provider would remain in the market in the long run.<sup>17</sup> It was further posited that cable television was a "capital intensive" industry, due to the large initial investment required to construct a "cable grid."<sup>18</sup> Advocates of the natural monopoly theory therefore maintained that the exclusive franchise model was the most efficient means of structuring the cable indus-

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15. Daniel L. Brenner, *Was Cable Television a Monopoly?*, 42 FED. COMM. L.J. 365 (1990). A "natural monopoly" is an industry where: (1) one firm can meet the demand in the market at a cost less than if multiple firms were to produce the same quantity; (2) the industry is "capital intensive," meaning that the initial cost for entering the market as a producer is high; and (3) the industry exhibits "economies of scale," meaning that once the fixed cost of market entry is expended, the average cost of each unit of output decreases as more units are produced, providing a compelling incentive for the provider to expand market share. Commentators posited that the economies of scale in the cable industry would, if competition were attempted, invariably result in a single cable provider remaining. Donald L. Bell, *Unbundling: An Alternative to the Current System of Cable Television Franchising*, 21 CUMB. L. REV. 43, 63-65 (1990).

While it is debatable whether cable actually was a "natural monopoly" similar to a public utility, see Thomas W. Hazlett, *Private Monopoly and the Public Interest: An Economic Analysis of the Cable Television Franchise*, 134 U. PA. L. REV. 1335 (1986), the fact that it was treated as such dramatically influenced the development of the industry. Brenner, *supra*, at 369.

16. Hazlett, *supra* note 15, at 1345.

17. Hazlett, *supra* note 15, at 1348-49. On this assumption, it is in the public interest to grant an exclusive franchise, thus obviating a wasteful and disruptive period of competition.

18. Bell, *supra* note 15, at 64-65. A "cable grid" is essentially the physical cable system installed in a city.

try. Thus, the perception that the cable industry was a natural monopoly served as a rationale for local and state governments to grant exclusive franchises.<sup>19</sup> In turn, the grant of exclusivity created a correlative justification for regulating the franchises.<sup>20</sup>

Proponents of the natural monopoly theory asserted that economies of scale existed in the cable industry.<sup>21</sup> Purportedly, any initial competition in a given cable franchise area would lead inexorably to a single remaining provider. Under this theory, where several cable providers have made the initial investment of installing a cable grid in a particular location, the costs of adding each additional subscriber and therefore lowering the average costs and increasing the profit margin, would be minimal. Thus, the incentive to acquire all potential additional customers would be substantial. Consequently, through competition, the most efficient provider would inevitably capture the entire market. As this process was deemed inherently wasteful, exclusive franchising seemed to be a plausible alternative.<sup>22</sup>

The enormous expense of installing a cable grid<sup>23</sup> further encouraged the granting of exclusive franchises. Exclusivity protected smaller, financially weaker cable providers from the threat of larger cable companies "overbuilding"<sup>24</sup> the smaller company's system and then competing. The "superior financial position" of larger companies "would insulate them from what might otherwise be serious losses. Such firms would be willing to forego short term prof-

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19. Hazlett, *supra* note 15, at 1345. See also Jay Lee Kanzler, Jr., *Getting the Picture on Cable Franchise Monopolies*, 47 J. MO. B. 53, 55 (1991). In addition, "[b]y limiting the number of cable franchises, the local governments are said to serve the purposes of '(1) preserving public streets and sidewalks for their intended uses, (2) preventing deterioration of aesthetic qualities of the community's environment, and (3) obtaining the best cable television system for those who subscribe.'" *Id.* (quoting GEORGE H. SHAPIRO ET AL., 'CABLE SPEECH': THE CASE FOR FIRST AMENDMENT PROTECTION 173 (1983)).

20. Traditionally, the problem of natural monopoly has been addressed by price regulation. The firm is permitted to exclusively serve the market, protected from potential competition. In the absence of competition as a means of ensuring fair pricing, government regulation is imposed. HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 34 (1994).

21. Hazlett, *supra* note 15, at 1348-49 (quoting *Omega Satellite Prod. Co. v. City of Indianapolis*, 694 F.2d 119, 126 (7th Cir. 1982) (Posner, J.)).

22. *Id.*

23. Bell, *supra* note 15, at 64-65. See also Michael I. Meyerson, *The First Amendment and the Cable Television Operator: An Unprotective Shield Against Public Access Requirements*, 4 COMM. & ENT. L.J. 1 (1982).

24. "Overbuild" simply means to build an additional cable grid in an area already served by a cable system.

its, even sustaining losses, to obtain a monopoly."<sup>25</sup> Thus, exclusive franchises were granted for periods of several years to protect cable operators from competition so they could recoup their initial capital investment.<sup>26</sup>

Consistent with the perception that cable was a natural monopoly, cable franchisors invariably granted exclusive franchises (express or in fact)<sup>27</sup> to cable providers.<sup>28</sup> Congress has acknowledged that exclusive franchises were incident to the initial development of the cable industry, finding competition to be absent "[f]or a variety of reasons, including local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area."<sup>29</sup>

## 2. Regulation of Cable Television

The perception that cable was a natural monopoly and the exclusive franchising that resulted from that perception provided the impetus for the regulation of the industry.<sup>30</sup> Classical economic theory teaches that competition regulates market participants' economic behavior so that firms will be forced to provide goods and services at reasonable costs.<sup>31</sup> Because the dynamics of a natural monopoly eventually result in the elimination of competition, government regulation is thought to be "necessary to protect the consumer from exploitation."<sup>32</sup> Therefore, exclusive franchising in the cable industry necessitated government regulation.

Cable franchising authorities possessed three means of regulatory power over cable providers. First, cable franchise rates were regulated.<sup>33</sup> Until 1984, cities clearly exercised power over cable television rates for "basic service," within guidelines set by the

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25. Bell, *supra* note 15, at 71.

26. MORTON I. HAMBURG, ALL ABOUT CABLE: LEGAL AND BUSINESS ASPECTS OF CABLE AND PAY TELEVISION § 4.02[2], at 4-18 (rev. ed. 1996).

27. Some states have not recognized municipalities' authority to grant exclusive cable franchises, while others only nominally permit the exclusive grant. Regardless, the exclusivity of franchises was accepted and adhered to by the industry and the government. See Brenner, *supra* note 15, at 371.

28. *Id.* at 410.

29. 47 U.S.C. § 521(a)(2) (1994).

30. Brenner, *supra* note 15, at 396. See also HOVENKAMP, *supra* note 20, at 34.

31. See, e.g., ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Bruce Mazlish ed., 1961).

32. Cantor v. Detroit Edison Co., 428 U.S. 579, 596 (1976).

33. Brenner, *supra* note 15, at 397.

FCC.<sup>34</sup> Second, in exchange for a noncompetitive market, cable operators were required to pay "franchise fees" to the regulatory authority.<sup>35</sup> Essentially, franchise fees were annual charges imposed on the cable providers by local or state governments in exchange for the privilege of using the public rights of way.<sup>36</sup> Franchise fees quickly became the subject of competitive bidding by potential cable providers.<sup>37</sup> In response, the FCC limited the amount that municipalities could charge in franchise fees.<sup>38</sup> However, the bidding process for franchises continued, with in-kind competitive bids<sup>39</sup> offered by cable providers in exchange for exclusive franchises.<sup>40</sup> Third, cable franchising authorities had the power to determine whether a particular franchise would be renewed at the end of its duration. For municipalities, the renewal process was a source of leverage that could be used to obtain improved service from the cable provider.<sup>41</sup>

Until 1984, no uniform standards existed regarding the regulation of cable television.<sup>42</sup> During the 1970s, regulatory power oscillated between the states and the FCC. While regulatory power was exercised concurrently by local and state governments and the FCC,<sup>43</sup> by 1974 it was clear that the FCC maintained preemptive authority over the states in cable regulation.<sup>44</sup> Cable operators criticized this dual regulation as a source of contradiction as well as an impediment to the development of the industry.<sup>45</sup>

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34. *Id.* at 398. "Basic service" means the lowest minimum cable services that a subscriber may purchase.

35. *Id.* at 399.

36. Michael I. Meyerson, *The Cable Communications Policy Act of 1984: A Balancing Act on the Coaxial Wires*, 19 GA. L. REV. 543, 555 (1985).

37. Brenner, *supra* note 15, at 399.

38. Robert F. Copple, *Cable Television and the Allocation of Regulatory Power: A Study of Governmental Demarcation and Roles*, 44 FED. COMM. L.J. 1, 32 (1991).

39. "In-kind" bids tendered by franchise applicants have included such promises as planting 20,000 trees in the city. See Kanzler, *supra* note 19, at 56.

40. *Id.* at 55-56. The FCC imposed a fee ceiling on in-kind payments as well. See Meyerson, *supra* note 36, at 555.

41. See HAMBURG, *supra* note 26, § 4.04, at 4-54.

42. S. REP. NO. 92, *supra* note 5, at 2, reprinted in 1992 U.S.C.C.A.N. at 1134.

43. David W. Arnesen & Marlin Blizinsky, *Cable Television: Will Federal Regulation Protect the Public Interest?*, 32 AM. BUS. L.J. 627, 630-31 (1995).

44. Copple, *supra* note 38, at 27-28. The FCC was initially reluctant to regulate the cable industry because it was unclear as to whether it had the authority to do so. *Id.* at 17-22.

45. See Arnesen & Blizinsky, *supra* note 43, at 631.



### 3. The 1984 Cable Act

The Cable Communications Policy Act of 1984 was enacted in response to intensive pressures from the cable industry and local governments to establish a national regulatory policy for cable television.<sup>46</sup> Congress intended the 1984 Cable Act to facilitate growth and development in the cable industry by minimizing the economic burdens of perceived unnecessary regulation, thus promoting competition.<sup>47</sup> The 1984 Act established guidelines for the regulation of several aspects of the cable industry including rates, franchise fees, and franchise renewals.<sup>48</sup> The 1984 Cable Act prohibited rate regulation where a cable operator faced "effective competition," which resulted in rate deregulation for approximately 97% of the cable industry.<sup>49</sup> Franchise fees were limited to a maximum of 5% of the gross yearly revenue of the cable system.<sup>50</sup> Finally, the 1984 Cable Act created a "strong presumption in favor of franchise renewal at the end of the franchise term."<sup>51</sup> In sum, the 1984 Act severely curtailed the means of control traditionally exercised by franchising authorities over cable providers.

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46. Nicholas P. Miller et al., *The Cable Communications Policy Act of 1984 and Franchising Renewals*, in CABLE TELEVISION LAW 1989: DEALING WITH THE LAW CHALLENGES, at 9 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. 267, 1989). See also *Turner Broadcasting Sys. v. FCC*, 819 F. Supp. 32, 53 (D.D.C. 1993), *vacated*, 114 S. Ct. 2445 (1994).

47. FEDERAL COMMUNICATIONS COMMISSION, *In the Matter of Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 F.C.C.R. 362 (1989) [hereinafter *Competition*]. While the 1984 cable legislation ostensibly was designed to promote competition, the Act in fact blocked one of the greatest potential sources for competition: The entry of telephone companies into the cable industry. Alan F. Ciamporzero, *Telephone Company Provision of Cable Television Service 1991*, in CABLE TELEVISION LAW 1992: CABLE FACES CONGRESS, THE COURTS, AND COMPETITION, at 9 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G4-3877, 1992). The 1984 Act codified earlier FCC restrictions on cross-ownership between telephone and cable companies operating in the same area, purportedly to prevent telephone companies that already controlled telephone pole and conduit space required for the installation of cable, from concentrating control of markets. *Final Report and Order*, 21 F.C.C.2d 307, *modified*, 22 F.C.C.2d 746 (1970), *aff'd*, *General Tel. Co. v. United States*, 449 F.2d 846 (5th Cir. 1971). The exclusion of telephone companies from the cable industry is beyond the scope of this Note.

48. S. REP. NO. 92, *supra* note 5, at 2, *reprinted in* 1992 U.S.C.C.A.N. at 1134-35.

49. *Id.* at 4, *reprinted in* 1992 U.S.C.C.A.N. at 1136. The FCC's first standards for determining whether a cable system faced effective competition were based on whether subscribers could receive three over-the-air local television signals. *Id.* Cable systems serving subscribers in an area deemed to face effective competition were not subject to rate regulation. See Copple, *supra* note 38, at 66-68.

50. 47 U.S.C. § 542(b) (1994).

51. Brenner, *supra* note 15, at 404-05.

#### 4. Effects of the 1984 Act

These changes in regulation served as catalysts for growth in the cable industry. By 1992, cable service was available to over 90% of the homes in the country. Viewers had an average of thirty-six channels to choose from and a 50% increase in programming choices.<sup>52</sup> In the words of the FCC, "there can be no doubt that the cable industry has prospered under the Cable Act" of 1984.<sup>53</sup>

While the 1984 Act was successful in promoting industry growth, it was unsuccessful in promoting competition.<sup>54</sup> The Senate Committee on Commerce, Science, and Transportation reported that cable providers serving local communities invariably enjoyed a monopoly.<sup>55</sup> The monopoly status was problematic in light of the fact that the 1984 Cable Act greatly diminished the local and state government's means of regulating the cable providers by circumscribing rate regulation, limiting franchise fees, and creating a presumption in favor of franchise renewal.<sup>56</sup> By 1992, Congress recognized that "the cable industry now possesses undue market power which is used to the detriment of consumers, programmers, and competing video distributors."<sup>57</sup>

The obvious result of exclusive franchises is that consumers in the franchise area have no choice among cable providers. In the absence of regulation, the exclusive franchisee is at liberty to extract higher fees from consumers, and provide fewer services of poorer quality than those providers faced with competition.<sup>58</sup> This

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52. S. REP. NO. 92, *supra* note 5, at 3, *reprinted in* 1992 U.S.C.C.A.N. at 1135.

53. *Competition*, *supra* note 47, at 362.

54. See generally Nicholas W. Allard, *The 1992 Cable Act: Just the Beginning*, 15 HAST. COMM. & ENT. L.J. 305 (1993).

55. S. REP. NO. 92, *supra* note 5, at 8, *reprinted in* 1992 U.S.C.C.A.N. at 1143.

56. Brenner, *supra* note 15, at 404-05.

57. S. REP. NO. 92, *supra* note 5, at 3, *reprinted in* 1992 U.S.C.C.A.N. at 1135.

58. The nature of the monopoly possessed by most cable systems was summarized in the Commerce Committee's report:

The value of a cable franchise follows from the protection from competition that it provides the holder. Since the holder of the franchise will have a monopoly, the prospective cable operator would be able to generate a cash flow that would result in a supernormal return on investment in assets other than the franchise . . . . [B]ecause the franchise limits the customers to a single provider in the market, other "customer oriented" intangibles relating to the expectation of future patronage do not exist for a cable system. There is a goodwill in a monopoly. Customers return, not because of any sense of satisfaction with the monopolist, but rather because they have no other choices. S. REP. NO. 92, *supra* note 5, at 9, *reprinted in* 1992 U.S.C.C.A.N. at 1143 (quoting from the reply brief in *Telecommunications, Inc. v. Commissioner*, 95 T.C. 36 (1990)).

For an argument that goodwill may coexist with monopoly in the cable industry,

unprotected status of consumer interests was exacerbated by a difference of opinion between the FCC and the Department of Justice during the 1980s. While the FCC deregulated rates under the 1984 Act, the Department of Justice determined that cable was a natural monopoly and thus immune from federal antitrust liability.<sup>59</sup> The result was that municipalities could "determine that a single cable firm will best serve its citizens," but were powerless to "limit the welfare loss arising from monopoly pricing."<sup>60</sup> Thus, neither rate regulation nor antitrust liability were applied by the federal government to the cable industry.<sup>61</sup>

The pervasiveness of essentially unregulated franchise monopolies in the cable industry was suspected of generating adverse market results.<sup>62</sup> Congress observed that in the wake of the 1984 Act, average monthly cable rates nearly tripled.<sup>63</sup> The Senate Com-

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see Joshua G. Genser, *The Economic Case for the Coexistence of Monopoly Power and Goodwill in the Cable Television Industry*, 16 HAST. COMM. & ENT. L.J. 265 (1994).

59. Glenn B. Manishin, *Antitrust and Regulation in Cable Television: Federal Policy at War With Itself*, 6 CARDOZO ARTS & ENT. L.J. 75, 77-78 (1987). State and local governments could exercise power to grant exclusive franchises, thus creating localized monopoly power in the cable industry, under "State Action Immunity." The United States Supreme Court held, in *Parker v. Brown*, 317 U.S. 341 (1943), that states may impose anticompetitive restraints in the exercise of their sovereign powers, immune from federal antitrust liability. The "State Action Immunity" doctrine was extended in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), where the Court held that a municipality may impose anticompetitive restraints pursuant to a state policy to displace competition with monopoly public service or regulation. The Court circumscribed the "State Action Immunity" doctrine somewhat in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), holding that the state policy relied on by a municipality or local government should be clearly articulated and expressed. The *Midcal* holding was applied in *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982), where the Court held that an anticompetitive cable ordinance enacted by a city pursuant to the municipality's "Home Rule" authority did not automatically fall under the "State Action" exemption from Sherman Act liability, because the ordinance was found not to further or implement an affirmatively expressed or clearly articulated state policy. *Id.* at 55.

60. See Manishin, *supra* note 59, at 90. The effectiveness of antitrust law was further diminished when, in response to the Supreme Court's decision in *Community Communications*, 455 U.S. 40 (holding that municipalities are not automatically protected by "State Action Immunity" from antitrust liability), Congress enacted the "Local Government Antitrust Act of 1984," barring recovery of money damages against local governments or employees for antitrust violations. 15 U.S.C. §§ 34-36 (1994).

61. See Manishin, *supra* note 59, at 76. See also Albert K. Smiley, *Regulation and Competition in Cable Television*, 7 YALE J. ON REG. 121, 121 (1990).

62. See Kanzler, *supra* note 19, at 54. "The controversy surrounding cable television is a direct result of two forces: exclusive franchises awarded by municipalities, and, deregulation under the 1984 Act. The effect has been a continued increase in consumer prices and increased company values." *Id.*

63. 47 U.S.C. § 521(a)(1) (1994).

merce Committee found that, in the handful of communities<sup>64</sup> where two competing cable systems operated, rates were “approximately 20 percent lower and the per-channel prices [were] as much as 50 percent lower than in communities with only one cable system.”<sup>65</sup> The Committee also found that the absence of competition in the cable industry was responsible for “abominable” customer service.<sup>66</sup>

### 5. The Cable Television Consumer Protection and Competition Act of 1992

In response to the imbalance of market power in the cable market, the 1992 Cable Act was intended to “ensure that cable television operators do not have undue market power.”<sup>67</sup> In part, Congress attempted to effectuate this policy through the promotion of managed competition.<sup>68</sup> Section 541(a), which prohibits municipalities from granting exclusive franchises and encourages granting second franchises, was one of the mechanisms created to promote managed competition.<sup>69</sup>

Congress began investigating apparent problems within the cable industry in 1989 when the Senate Committee on Commerce, Science, and Transportation initiated hearings on competition problems in the cable industry.<sup>70</sup> On November 15, 1989, Senator

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64. SEN. REP. NO. 92, *supra* note 5, at 13, *reprinted in* 1992 U.S.C.C.A.N. at 1146. Out of 11,000 cable systems, there were only 53 communities where competition was present or possible. *Id.*

65. *Id.*

66. *Id.* at 3, *reprinted in* 1992 U.S.C.C.A.N. at 1135.

67. 47 U.S.C. § 521(b)(5) (1994).

68. While the 1992 Act speaks of promoting competition in the cable industry, it is more accurate to describe the legislative objective as that of “managed competition”—a regulated competitive market. One chief criticism of the Act voiced at the time of enactment was that the legislation effectively imposed regulation, while purporting to promote competition. S. REP. NO. 92, *supra* note 5, at 94-97, *reprinted in* 1992 U.S.C.C.A.N. at 1227-30. Indeed, the Act imposed significant regulatory measures over the cable industry, in contrast to the 1984 cable legislation. *Id.* However, the stated objective of the 1992 Act was to promote competition by controlling the major impediment to competitive cable markets—“undue market power.” *Id.* at 1, *reprinted in* 1992 U.S.C.C.A.N. at 1133-34. Thus the 1992 Act regulatory measures designed to deter monopolistic behavior were perceived as a prerequisite to facilitating competitive cable markets.

69. Section 541(a)(1) states in pertinent part that “[a] franchising authority may award, in accordance with the provisions of this subchapter, 1 or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise.” 47 U.S.C. § 541(a)(1) (1994).

70. S. REP. NO. 92, *supra* note 5, at 3, *reprinted in* 1992 U.S.C.C.A.N. at 1135. By

Danforth introduced S. 1880, the predecessor to the bill that would become the 1992 Cable Act.<sup>71</sup> The version of Senator Danforth's bill that emerged from committee included a provision encouraging local franchising authorities to award second franchises.<sup>72</sup> The committee amendment provision stated that franchising authorities were prohibited from granting exclusive franchises and from "unreasonably refus[ing] to award an additional competitive franchise."<sup>73</sup> Section 541(a) was silent on the question of whether it applied to preexisting exclusive franchises.<sup>74</sup>

Other provisions in the Act aimed to increase competition as well. Section 541(f) mandated that no provision of the Act be construed to impede a local government's ability to operate a franchise.<sup>75</sup> This section was designed to support municipalities seeking to provide cable services in competition with private cable providers. Again, the law contained no statement specifying what effect this provision had on preexisting exclusive franchises.

Section 548 deals with problems of unfair competition marked by exclusive contracts between video programmers and providers.<sup>76</sup> Like section 541(a), section 548(c)(2)(D) generally prohibits exclusive contracts that are not in the public interest.<sup>77</sup> However, in contrast to sections 541(a) and 541(f), Congress specified this provision's retroactive scope, exempting satellite cable contracts en-

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the time of passage of the 1992 Act, the Senate Commerce Committee and Communications Subcommittee had held over 20 such hearings. Allard, *supra* note 54, at 309-11.

71. S. REP. NO. 92, *supra* note 5, at 62, *reprinted in* 1992 U.S.C.C.A.N. at 1195. On June 7, 1990, S. 1880 was reported favorably by the Senate Commerce Committee, adopting an amendment in the nature of a substitute. In January, 1991, Senator Danforth reintroduced the bill as S. 12. The Committee reported S. 12 favorably on May 14, 1991, again adopting an amendment in the nature of a substitute.

72. *Id.*

73. *Id.* at 91, *reprinted in* 1992 U.S.C.C.A.N. at 1224.

74. At least one commentator has interpreted this provision to apply to preexisting franchises. See Kathy L. Cooper, Comment, *The Cable Industry: Regulation Revisited in the Cable Television Consumer Protection and Competition Act of 1992*, 1 COMM. L. CONCEPTUS 109, 123 (1993).

75. The provision states that "[n]o provision of this chapter shall be construed to . . . prohibit a local or municipal authority that is also, or is affiliated with, a franchising authority from operating as a multichannel video programming distributor in the franchise area, notwithstanding the granting of one or more franchises by such franchising authority." 47 U.S.C. § 541(f) (1994).

76. § 548.

77. § 548(c)(2)(D). Section 548(c)(4) stipulates that determinations as to whether exclusive contracts serve the "public interest" must consider the effects on competition, the attraction of capital investment, the effect on the diversity of programming, and the duration of the contract. *Id.*

tered into prior to June 1, 1990.<sup>78</sup>

The bill was vetoed by President Bush on October 3, 1992.<sup>79</sup> On October 5, 1992, the Senate voted seventy-four to twenty-five to override the president's veto.<sup>80</sup> The House voted to override the veto by a similar margin, 308 to 114, on the same day.<sup>81</sup> Thus, on October 5, 1992, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992.<sup>82</sup>

In sum, the 1992 Act was designed to protect consumers from the market power exercised by cable providers in the wake of the 1984 deregulation of the cable industry. The Act impliedly challenged the status of cable as a "natural monopoly" by seeking to effectuate managed competition as the means of protecting consumer interests, primarily by prohibiting exclusive franchises. Congress failed, however, to specify what effect the new legislation would have on preexisting exclusive franchises.

## II. RETROACTIVITY ANALYSIS—THE *LANDGRAF* STANDARD

In the absence of any statement as to the effect of the new legislation on preexisting exclusive franchises, the issue was left to the courts. Both the *Cox* and *James Cable* courts framed the issue of whether section 541(a) applied to preexisting exclusive franchises in terms of whether the statute may operate retroactively.<sup>83</sup> In *Landgraf v. USI Film Products*,<sup>84</sup> decided after *Cox*, the Supreme Court promulgated its most recent test for determining whether a statute may apply retroactively.<sup>85</sup> Because the issue in *Cox* and

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78. § 548(h)(1).

79. Message to the Senate Returning Without Approval the Cable Television Consumer Protection and Competition Act of 1992, II PUB. PAPERS: George Bush 1751 (Oct. 3, 1992). President Bush criticized the bill, preferring that less regulation be imposed.

80. 138 CONG. REC. S16,676 (daily ed. Oct. 5, 1992).

81. 138 CONG. REC. H11,487-88 (daily ed. Oct. 5, 1992).

82. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 102 Stat. 1374 (codified as amended in scattered sections of 47 U.S.C.).

83. See *infra* part III. For a complete history of the development of the presumption against retroactivity, see Elmer E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775 (1936). See also Ray H. Greenblatt, *Judicial Limitations on Retroactive Civil Legislation*, 51 NW. U. L. REV. 540 (1956).

84. 114 S. Ct. 1483 (1994).

85. The issue in *Landgraf* was whether § 102 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified in scattered sections of 42 U.S.C.), applied to a case of sexual harassment that was pending when the legislation passed. The petitioner had filed a sexual harassment claim that was dismissed pursuant to a bench trial, finding that her employment was not terminated in violation of Title VII. The

*James Cable* concerned retroactivity, the *Landgraf* test is the applicable law by which the courts' analyses are measured.<sup>86</sup>

The test prescribed by *Landgraf* for determining whether a statute operates retroactively begins first with the threshold inquiry of whether Congress had expressly stated the statute's scope.<sup>87</sup> Where this is the case, no further analysis is required as to the retroactivity of the statute since Congress's intent is clear.<sup>88</sup> However, if

the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.<sup>89</sup>

Thus, the Court established a two part analysis governing judicial determinations of a statute's temporal scope absent an express con-

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Civil Rights Act of 1991, which authorized recovery of damages and entitlement to a jury trial, was signed into law while the petitioner's appeal was pending. The petitioner's argument that her case should be remanded for a jury trial on damages pursuant to the 1991 Civil Rights Act was rejected by the United States Court of Appeals for the Fifth Circuit. The Supreme Court affirmed the court of appeals decision and held that § 102 did not apply to the petitioner's case. *Landgraf*, 114 S. Ct. at 1488-89, 1508. For discussion of the *Landgraf* opinion, see Kelli D. Taylor, Comment, *The Civil Rights Act of 1991 and Retroactivity: Do Landgraf v. USI Film Products and Rivers v. Roadway Express, Inc. Signify a New Era of Restrictive Employment Discrimination Cases?*, 17 AM. J. TRIAL ADVOC. 773 (1994); Janine M. Weaver, Note, *Reconciling the Irreconcilable: Landgraf v. USI Film Products*, 28 CREIGHTON L. REV. 1061 (1995).

86. Note that the *Landgraf* opinion was decided after *Cox* but prior to *James Cable*.

87. *Landgraf*, 114 S. Ct. at 1505.

88. However, constitutional challenges in the form of Due Process may still exist. *Id.* at 1497.

89. *Id.* at 1505. As noted at note 92, *infra*, Justice Scalia fundamentally disagrees with the majority's use of congressional intent for determining a statute's retroactivity.

Notably, in his dissenting opinion, Justice Blackmun adhered to a vested rights analysis and reached the conclusion that § 102 of the 1991 Civil Rights Act applies retroactively. See *infra* note 147 for a discussion of the vested rights analysis. He reasoned that as a piece of remedial legislation, § 102 "does not proscribe any conduct that was previously legal." *Landgraf*, 114 S. Ct. at 1509 (Blackmun, J., dissenting). One commentator has noted that the *Landgraf* majority and dissent, using similar analyses but reaching opposite conclusions, indicates the confusion that will likely be experienced by lower courts in applying the vested rights standard. Leonard Charles Presberg, Comment, *The Civil Rights Act of 1991, Retroactivity, and Continuing Violations: The Effect of Landgraf v. USI Film Products and Rivers v. Roadway Express*, 28 U. RICH. L. REV. 1363, 1369 (1994).

gressional directive.<sup>90</sup> The court must (1) determine whether the statute would have “retroactive effect,”<sup>91</sup> and if so, (2) discern whether there is “clear congressional intent”<sup>92</sup> that the statute so operate.

### III. PRINCIPAL CASES

The Sixth and Eleventh Circuits reached opposite conclusions on the issue of whether section 541(a) should apply retroactively. The court in *James Cable* stated that the *Landgraf* decision, rendered after *Cox*, dispositively decided that the provision should not apply retroactively. The *James Cable* court therefore maintained that the *Cox* decision was erroneous in light of *Landgraf*.

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90. The *Landgraf* opinion reconciles a longstanding tension between two lines of reasoning, one represented by *Bradley v. Richmond Sch. Bd.*, 416 U.S. 696, 711 (1973), which held that a court must “apply the law in effect at the time it renders its decision,” and the other represented by *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), which held that statutes will not be interpreted “to have retroactive effect unless their language requires this result.” *Landgraf*, 114 S. Ct. at 1496. The Court expressly stated that *Bradley* did not alter and was not inconsistent with the presumption against retroactivity. The holding in *Landgraf* reconciled the cases by mandating that, where a statute is retroactive in effect, the presumption against retroactivity applies unless there is clear congressional intent to the contrary. *Id.* at 1505. Thus, the “law in effect” applies in light of the presumption against retroactivity absent clear congressional intent.

91. The Court determines whether a statute has “retroactive effect” based on a two-factor analysis. The Court examines whether the statute interferes with a right typically afforded protection from the retroactive application of a statute. Rights are thus classified into categories of those which are protected, substantive, “vested rights,” such as contract rights, and those which are unprotected, as is the case with statutes effecting procedural or jurisdictional changes. *Landgraf*, 114 S. Ct. at 1500-02. The Court also considers equitable notions of “fair notice, reasonable reliance, and settled expectations.” *Id.* at 1499. See *infra* part IV.

92. The Court discerned congressional intent by looking at the text and legislative history of the statute. In his concurring opinion, Justice Scalia criticized the majority, stating his agreement that “clear congressional intent” is required, but that such intent can only be found by a “clear statement.” *Id.* at 1522 (Scalia, J., concurring). He attacked the majority’s inquiry into the legislative history of the 1991 Civil Rights Act, stating that “[t]his effectively converts the ‘clear statement’ rule into a ‘discernible legislative intent’ rule.” *Id.* The tension between the majority and concurring opinions in *Landgraf* over what factors to consider in evaluating Congress’s intent reflects a longstanding debate about the appropriate role of legislative history in statutory interpretation. See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 624 (1990). Justice Scalia’s approach to statutory construction is guided by the position that “once the Court has ascertained a statute’s plain meaning, consideration of legislative history becomes irrelevant.” *Id.* at 623.



A. Cox Cable Communications, Inc. v. United States<sup>93</sup>

## 1. Facts

In 1983, the ten-year exclusive franchise agreement for the provision of cable television services between Cox Cable Communications and Robins Air Force Base (hereafter "Air Force") expired.<sup>94</sup> The Air Force subsequently sought bids for a new contract and awarded a ten year exclusive franchise to Centerville, Georgia.<sup>95</sup> Claiming that its First and Fifth Amendment rights had been infringed<sup>96</sup> and asserting a right to renewal pursuant to the Cable Communications Policy Act of 1984,<sup>97</sup> Cox Cable filed suit.<sup>98</sup> A preliminary injunction was granted, prohibiting the Air Force from excluding Cox Cable from the base and mandating that Cox Cable be permitted to provide cable services alongside Centerville.<sup>99</sup> Centerville intervened in the suit, focusing on the potential detrimental effects a settlement between Cox Cable and the Air Force could have on its exclusive franchise with the latter party.<sup>100</sup>

The Air Force elected to settle with Cox Cable,<sup>101</sup> and did not oppose Cox Cable's motion for summary judgment on the First Amendment claim.<sup>102</sup> Centerville filed a cross-motion in opposition to summary judgment for both the First and Fifth Amendment claims asserted by Cox Cable.<sup>103</sup> The district court granted Centerville's motion on the Fifth Amendment claim, granted Cox Cable's motion on the First Amendment claim, and converted the preliminary injunction against the Air Force into a permanent injunction.<sup>104</sup> Centerville appealed. After the filing of briefs, but before oral argument, the 1992 Cable Act went into effect.<sup>105</sup>

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93. 992 F.2d 1178 (11th Cir. 1993).

94. *Id.* at 1180.

95. *Id.* 47 U.S.C. § 541(f) enables municipalities to provide cable services.

96. See *infra* part V.A.3 and *infra* note 271 for a limited discussion of how these amendments apply.

97. 47 U.S.C. §§ 521-559 (1994).

98. *Cox*, 992 F.2d at 1180.

99. *Id.*

100. *Id.*

101. It is not clear what the nature of the settlement was from the Court of Appeals opinion.

102. *Cox*, 992 F.2d at 1180.

103. *Id.*

104. *Id.*

105. *Id.*

## 2. Court of Appeals Opinion

The United States Court of Appeals for the Eleventh Circuit first determined that the Air Force was indeed a “franchising authority” subject to the 1992 Cable Act.<sup>106</sup> The court then considered what impact the Act had on Centerville’s existing exclusive franchise agreement. The court stated that “[t]he Cable Competition Act does not automatically invalidate existing exclusive franchises; rather, it invalidates the exclusivity of [exclusive] franchises when a qualified applicant requests access to the market serviced by those franchises.”<sup>107</sup> The court reasoned that “[g]iven that the award of exclusive franchises is prohibited by the first clause of the Act[,] . . . refusal to award an additional franchise solely because of the existence of an exclusive franchise with another party would be an ‘unreasonable refusal’ under the Act.”<sup>108</sup> The *Cox* court reasoned that its holding effectuated the intent of Congress, finding that “[w]hile Congress could have chosen [not to affect preexisting franchises], we conclude from the text of the Act that it did not do so.”<sup>109</sup> The *Cox* court based its conclusion on its reading of the Act’s text, and the conclusion that an exclusively prospective reading of section 541(a) would mean that “full and uniform application of the Act could not occur until after the expiration of all existing franchises.”<sup>110</sup>

Finally, the court expressed no opinion on Centerville’s claims that the Act was unconstitutional on Due Process grounds. Instead, it remanded the case to the district court with instructions to dismiss the case if the Act was found unconstitutional.<sup>111</sup>

### B. *James Cable Partners v. City of Jamestown*<sup>112</sup>

#### 1. Facts

In 1977, the city of Jamestown, Tennessee, granted a cable tele-

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106. *Id.* at 1181. Because the Air Force settled with Cox Cable, the question arose as to whether Centerville, as an intervenor, had legal standing to continue on appeal. *Id.* at 1180. The determination of this question was contingent on whether Centerville suffered an injury caused by Cox Cable, which itself turned on the question of whether the exclusivity provision of the franchise between the Air Force and Centerville was valid. *Id.* at 1181-82.

107. *Id.* at 1181.

108. *Id.*

109. *Id.* at 1182.

110. *Id.* at 1181-82.

111. *Id.* at 1182.

112. 43 F.3d 277 (6th Cir. 1995).

vision franchise for the duration of twenty-five years to Fentress County Cable Vision.<sup>113</sup> Pursuant to a memorandum agreement approved by the city of Jamestown, Fentress County Cable assigned the franchise to James Cable Partners in 1988. In January 1990, Jamestown granted to itself a franchise to operate a cable television system and proceeded to install and operate a parallel or "over-built" cable system in competition with James Cable. James Cable promptly filed suit in a state chancery court seeking a declaratory judgment that the exclusivity provision of their franchise had been breached by Jamestown.<sup>114</sup> The chancery court denied James Cable's request, but this denial was reversed by the Tennessee Court of Appeals.<sup>115</sup> The city's request for review by the Tennessee Supreme Court was denied. In January 1992, the chancery court enjoined Jamestown from operating its competing cable system.<sup>116</sup>

On October 5, 1992, Congress enacted the 1992 Cable Act.<sup>117</sup> In November 1992, James Cable filed suit in federal district court to obtain a declaration that retroactive application of the 1992 Cable Act would result in an unconstitutional taking of its property, and that the Act did not invalidate its exclusive franchise agreement.<sup>118</sup> Jamestown counterclaimed, arguing that all preexisting exclusive franchises were invalidated under the 1992 Cable Act.<sup>119</sup> On April 7, 1993, the district court enjoined Jamestown from competing with James Cable and from taking any action that violated James Cable's exclusive franchise agreement, including granting any other franchise.<sup>120</sup>

## 2. Court of Appeals Opinion

The court in *James Cable* held that section 541(a) did not apply to preexisting franchises. In so doing, it relied on the United States Supreme Court's opinion in *Landgraf v. USI Film Products*<sup>121</sup> for its analysis and reasoning. Beginning with the premise that "[t]he law does not favor retroactivity,"<sup>122</sup> the court delineated that a pre-

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113. *Id.* at 278.

114. *Id.*

115. *Id.*

116. *Id.*

117. *See supra* part I.A.5.

118. *James Cable*, 43 F.3d at 278.

119. *Id.*

120. *Id.*

121. 114 S. Ct. 1483 (1994).

122. *James Cable*, 43 F.3d at 279 (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)).

sumption against retroactivity applies when construing a statute that lacks "strong and imperative language" requiring retroactive effect.<sup>123</sup> The court disagreed with the holding in *Cox*, reasoning that *Landgraf* rejected inferring retroactive application of a statute from ambiguous and indirect language.<sup>124</sup> The court concluded that "[n]othing in the language of section [541(a)] compels retroactive application."<sup>125</sup> In interpreting the section 541(a) prohibition against "unreasonably refus[ing] to grant additional competitive franchises,"<sup>126</sup> the court concluded that "the existence of an exclusive franchise is an eminently 'reasonable' ground to refuse to award an additional franchise."<sup>127</sup>

The court then addressed Jamestown's argument that, if section 541(a) were interpreted to apply prospectively only and prohibit the city from operating a cable franchise, it would violate section 541(f). Section 541(f) forbids an interpretation of any other section of the Act that prohibits a local or municipal authority from operating a cable system regardless of the existence of other franchises previously granted by the authority.<sup>128</sup> Thus, Jamestown argued that an exclusively prospective interpretation of section 541(a) would violate section 541(f). The court disagreed, holding that "[i]t is the exclusive franchise that Jamestown previously granted James Cable that prohibits Jamestown from providing cable service, not any provision of the Act."<sup>129</sup>

The court stated that new statutory provisions involving contractual rights represented the "largest category of cases in which . . . the presumption against retroactivity" had been applied.<sup>130</sup> Next, the court rejected Jamestown's contention that the conference committee's statement that "exclusive franchises are directly

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123. *Id.* (citing *Landgraf*, 114 S. Ct. at 1499-1500).

124. *Id.* at 280 (citing *Landgraf*, 114 S. Ct. at 1495).

125. *Id.*

126. 47 U.S.C. § 541(a) (1994).

127. *James Cable*, 43 F.3d at 280.

128. Section 541(f) provides:

No provision of this chapter shall be construed to—

(1) prohibit a local or municipal authority that is also, or is affiliated with, a franchising authority from operating as a multichannel videoprogramming distributor in the franchise area, notwithstanding the granting of one or more franchises by such franchising authority; or

(2) require such local or municipal authority to secure a franchise to operate as a multichannel videoprogramming distributor.

§ 541(f).

129. *James Cable*, 43 F.3d at 280.

130. *Id.* (quoting *Landgraf v. USI Film Prods.*, 114 S. Ct. 1483, 1500 (1994)).

contrary to federal policy and to the purposes of the [1992 Cable Act]" required retroactive application.<sup>131</sup> Relying on *Landgraf*, the court "reject[ed] the idea that furthering the purpose of the statute can be a valid reason to apply it retroactively."<sup>132</sup>

### C. *Cox and James Cable's Application of the Landgraf Test*

*Cox* was decided prior to *Landgraf* and therefore could not have relied on the test formulated by the Supreme Court. The court in *Cox* did not explicitly address the first part of the *Landgraf* test, whether the 1992 Cable Act was retroactive in effect. The *Cox* court simply determined that the intent of Congress was made abundantly clear by the text.<sup>133</sup>

Conversely, the court in *James Cable* briefly analyzed whether the Act was retroactive in effect. Relying on a classification scheme delineated in *Landgraf*, the court reasoned that because the exclusivity of a franchise agreement is contractual, it belongs to the category of cases in which the Supreme Court has traditionally applied the presumption against retroactivity.<sup>134</sup> Thus the court failed to explicitly address equitable considerations germane to exclusivity and based its determination on the legal conclusion that exclusivity is contractual.<sup>135</sup>

*Landgraf* requires that, where a statute is retroactive in effect, the presumption against retroactivity governs absent clear congressional intent as evidenced by the text and legislative history.<sup>136</sup> Therefore, under *Landgraf*, a determination that section 541(a) operates retroactively requires an analysis of legislative intent. Neither opinion adequately addresses the question of legislative intent in light of *Landgraf*.

Other than its reading of the text of the Act, the *Cox* court offered no other authority for holding that section 541(a) applies to preexisting exclusive agreements. The *Cox* court reasoned exclusively from the text that if section 541(a) were not applied retroactively, uniform application of the Act would not occur until all

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131. *Id.* (quoting H.R. CONF. REP. NO. 862, 102d Cong., 2d Sess. 77 (1992), reprinted in 1992 U.S.C.C.A.N. 1133, 1231, 1259).

132. *Id.*

133. *Cox Cable Communications, Inc. v. United States*, 992 F.2d 1178, 1182 (11th Cir. 1993).

134. *James Cable*, 43 F.3d at 280 (quoting *Landgraf v. USI Film Prods.*, 114 S. Ct. at 1500).

135. *Id.*

136. See *supra* note 89 and accompanying text.

existing exclusive franchise agreements expired.<sup>137</sup> In *Landgraf*, the Court relied on legislative history when the text provided no clear directive. Section 541(a) contains no statement concerning its temporal scope and gives no indication of whether the existence of a preexisting exclusive franchise is a reasonable basis to refuse to grant a second franchise. In the absence of any clear text on the issue, it would have been improper under *Landgraf* for the *Cox* court to conclude its analysis without considering legislative history.

The court in *James Cable* considered the question of legislative intent more carefully. After stating that the language of the statute was ambiguous, the court dismissed an argument based on the legislative history, relying on *Landgraf* to support its conclusion that "furthering the purpose of the statute" is not a valid reason for applying it retroactively.<sup>138</sup>

The Sixth Circuit in *James Cable* misinterpreted the reasoning in *Landgraf*. In response to arguments on behalf of the plaintiff, the Court in *Landgraf* stated that furthering the purpose of a statute is not sufficient to rebut the presumption against retroactive application.<sup>139</sup> However, the Court expressed that the real reason for denying retroactive application was because the statutory provision at issue was "plainly not the sort of provision that *must* be understood to operate retroactively because a contrary reading would render it ineffective."<sup>140</sup> The court in *James Cable* ignored this reasoning in *Landgraf*. On the contrary, the reasoning in *Cox* parallels the Supreme Court in that *Cox* held retroactive application appropriate because otherwise the statute would not be fully applied.<sup>141</sup>

In addition, the Sixth Circuit in *James Cable* failed to recognize an important distinction between the legislative histories of the Civil Rights Act of 1991 involved in *Landgraf* and the 1992 Cable Act. The Court in *Landgraf* noted that the 1991 version of the Civil Rights Act represented a compromise version of the legislation.<sup>142</sup> In 1990, the President vetoed the bill, in part due to the unfairness of the bill's retroactivity provisions.<sup>143</sup> The 1991 version of the bill that Congress enacted omitted the retroactivity provisions of the

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137. *Cox*, 992 F.2d at 1181-82.

138. *James Cable*, 43 F.3d at 280.

139. *Landgraf v. USI Film Prods.*, 114 S. Ct. 1483, 1507-08 (1994).

140. *Id.* at 1508.

141. *Cox*, 992 F.2d at 1182.

142. *Landgraf*, 114 S. Ct. at 1492.

143. *Id.*

1990 bill.<sup>144</sup> In light of the other relevant legislative history, the Court in *Landgraf* concluded that this omission of retroactive language demonstrated that Congress "agreed to disagree" about retroactive application.<sup>145</sup> There is no comparable legislative history of the Cable Act that indicates a similar political compromise.<sup>146</sup>

Thus, neither the *Cox* nor the *James Cable* courts adequately applied the *Landgraf* test. The court in *Cox* neither explained whether the statute was retroactive in effect, nor clarified the meaning of the ambiguous text of section 541(a) with an analysis of legislative intent. The court in *James Cable* mechanically categorized the exclusivity interest as a contract right and thereby concluded that the presumption against retroactivity should apply. *James Cable*, however, provided little explanation of the legislative intent of Congress concerning retroactivity. Both courts mechanically interpreted the statute without giving consideration to factors such as the legislative history of the Act, the particular circumstances of the cable industry, or how retroactive application of the provision would affect the underlying interests of the parties.

#### IV. PROBLEMS WITH *LANDGRAF*'S STATUTORY CONSTRUCTION METHOD AND THE ALTERNATIVE OF PRACTICAL REASON

The *James Cable* court's reliance on *Landgraf* to reach its conclusion raises the question of whether the *Landgraf* test itself is sufficient to resolve the retroactivity issue. This Note asserts that, even if the court in *James Cable* had correctly applied the *Landgraf* test, the Supreme Court's framework is inadequate for judicial analysis of retroactivity in the current context.

##### A. *A Critique of Landgraf's Retroactivity Analysis*

Both prongs of the *Landgraf* test are problematic. In the first prong, whether the statute has "retroactive effect," the Court relies on difficult categorical distinctions while simultaneously purporting to address the equities of the case. This test results in confusing

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144. *Id.*

145. *Id.* at 1496.

146. In the President's veto message regarding the Cable Act, he made no mention of unfair retroactivity provisions as a basis for his veto. Message to the Senate Returning Without Approval the Cable Television Consumer Protection and Competition Act of 1992, II PUB. PAPERS: George Bush 1751 (Oct. 3, 1992). Moreover, Congress overrode the veto. Therefore, only one version of the statute was ever passed by Congress.

distinctions. The second prong, whether Congress intended the statute to apply retroactively, presumes that Congress may have a single, discernible intent.

1. Whether the Statute is Retroactive in Effect

In *Landgraf*, the Court analyzed whether the statute had retroactive effect by determining whether the interest effected by the new legislation was one typically protected by the Court from the retroactive application of legislation. Interests traditionally afforded protection were those involving "vested rights."<sup>147</sup> Thus, the Court engaged in drawing categorical distinctions between those interests that qualify as "vested rights," such as contract rights,<sup>148</sup> and those that do not. The Court cautioned, however, that determining whether a statute operates retroactively is not a simple or mechanical task.<sup>149</sup> The test is "whether the new provision attaches new legal consequences to events completed before its enactment."<sup>150</sup>

At least one commentator criticized the reasoning in *Landgraf*

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147. The Court quoted the definition of retroactive legislation offered by Justice Story in *Society for Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (No. 13,156): "[E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective." *Landgraf*, 114 S. Ct. at 1499.

The Court's reliance on the term "vested rights" contributes to the confusion in its retroactivity analysis. A vested right is a right which has "so completely and definitely accrued to or settled in a person that they are not subject to be defeated or canceled by the act of any other private person, and . . . the government should recognize and protect [the right as] settled according to the then current rules of law." BLACK'S LAW DICTIONARY 1654 (6th ed. 1990). The conceptual problem of vested rights in the context of a discussion of retroactivity is that "[t]here is no such thing as a law that does not extinguish rights, powers, privileges, or immunities acquired under previously existing laws." Bryant Smith, Note, *Retroactive Laws and Vested Rights*, 5 TEX. L. REV. 231, 233 (1927). Indeed, all laws change to some extent rights and duties that preceded the law.

148. *Landgraf*, 114 S. Ct. at 1500.

149. *Id.* While the Court recognized that it is not practical "to classify the enormous variety of legal changes with perfect philosophical clarity," several general categories were mentioned. *Id.* at 1499. The largest category of cases in which a presumption against retroactivity was applied were those involving contract and property rights, as those cases tended to be ones where "predictability and stability are of prime importance." *Id.* at 1500. However, where prospective relief, jurisdiction, or procedural rules are at issue, no presumption against retroactivity is applied. *Id.* at 1501-02. For an example of prospective relief escaping the presumption, the Court cited *American Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184 (1921), where § 20 of the Clayton Act, passed while the underlying action was pending appeal, was applicable to determining the propriety of injunctive relief against labor picketing. The Court held that "relief by injunction operates *in futuro*." *Landgraf*, 114 S. Ct. at 1501 (quoting *American Steel*, 257 U.S. at 201).

150. *Id.* at 1499.



for relying on "conclusory legal terms" instead of analyzing the impact that the decision would have on the rights of the parties.<sup>151</sup> As a consequence of relying on legal classifications, the test formulated in *Landgraf* "neglect[ed] to examine the equities" involved in a particular case.<sup>152</sup>

The *Landgraf* opinion, however, did purport to require more than a "mechanical" categorization of the interest affected. The Court stated that the question of retroactivity is a question of law, where judges must consider the "nature and extent" of the new provision and its relation to the past events, guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations."<sup>153</sup> The Court's statements in regard to notice, reliance, expectations, and fairness indicate that some balancing of the equities should be involved in determining retroactivity. Unfortunately, *Landgraf* did not specify how these equitable considerations are to be implemented in conjunction with the "vested rights" classification approach.

The *Landgraf* test for determining whether a statute is retroactive in effect resulted in a confusing distinction in examining the retroactivity of the compensatory damages provision of the Civil Rights Act of 1991.<sup>154</sup> The Court reasoned that recovery of statutorily authorized compensatory damages for discrimination that preceded the Civil Rights Act of 1991 would be retroactive in effect because compensatory damages are "quintessentially backward-looking," and would affect the liabilities of defendants for past behavior.<sup>155</sup> In effect, the Court categorized the interest effected by

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151. Presberg, *supra* note 89, at 1367-68.

152. *Id.* at 1396. Critics of the vested rights approach tend to suggest that greater clarity in analysis and greater fairness in result could be achieved if courts were expressly directed to base their analyses less on whether the right affected is vested or not vested, substantive or procedural, and more on the equities and policy considerations involved in each individual case. Determining whether a statute should be applied retroactively should be accomplished by "following precedent where there is a precedent, and deciding the novel cases as considerations of policy, justice, and equity may require." See Smith, *supra* note 147, at 247.

The vested rights approach also has been criticized as a static rule that forecloses discussion of important elements of statutory interpretation, such as legislative objectives and the relative strength of rights affected. See Greenblatt, *supra* note 83, at 561. See also Presberg, *supra* note 89, at 1403 (stating that any categorical vested rights analysis undermines issues of fairness and reliance in individual cases).

153. *Landgraf*, 114 S. Ct. at 1499.

154. *Id.* at 1503. The ambiguity of this distinction was noted by Justice Scalia in his concurring opinion. *Id.* at 1525.

155. *Id.* at 1506.

compensatory damages as a vested right.<sup>156</sup>

The Court distinguished the case of compensatory damages from its holding in a prior decision regarding attorney's fees.<sup>157</sup> The Court permitted recovery of statutorily authorized attorney's fees in a school desegregation case where the authorizing statute was enacted while the litigation was pending in *Bradley v. Richmond School Board*.<sup>158</sup> According to the Court in *Landgraf*, the presumption against retroactivity did not apply to attorney's fees in *Bradley* because they are "collateral to the main cause of action."<sup>159</sup> The *Landgraf* Court also noted equitable considerations at play in *Bradley* that justified retroactive application.<sup>160</sup>

The majority in *Landgraf* reasoned that "compensatory damages may be *intended* less to sanction wrongdoers than to make victims whole, but they do so by a mechanism that affects the liabilities of defendants."<sup>161</sup> It is unclear how attorney's fees in school desegregation cases substantially differ. The purpose of awarding attorney's fees in school desegregation cases is less to sanction segregated schools than to assure that plaintiffs can bring suit.<sup>162</sup> Like compensatory damages, attorney's fees affect the liabilities of the defendants. One could speculate that the equitable considerations involved in *Bradley* tipped the scales in favor of retroactivity. If this is the case, however, it is unclear why a contrary result occurred in *Landgraf* given the equitable considerations before the Court there. Permitting compensatory damages would not have violated principles of fairness, reliance or expectations, when "[a]t no time within the last generation has an employer had a vested right

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156. The Court reasoned that allowing compensatory damages for harm caused prior to the enactment of the statute "would have an impact on private parties' planning" and would "attach an important new legal burden to that conduct." *Id.* at 1506. Essentially, the Court articulated the principle that a person has a right to engage in improper conduct in reliance of the sanctions in place at that time, and that this right is protected from retroactive interference. *See id.* at 1506 n.35.

157. *Id.* at 1503.

158. 416 U.S. 696 (1973).

159. *Landgraf*, 114 S. Ct. at 1503.

160. *Id.* "[I]t would be difficult to imagine a stronger equitable case for an attorney's fee award than a lawsuit in which the plaintiff parents would otherwise have to bear the costs of desegregating their children's public schools." *Id.*

161. *Id.* at 1506.

162. "If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts." *Bradley v. Richmond Sch. Bd.*, 416 U.S. 696, 719 (1974) (quoting *Newman v. Piggie Park Enter., Inc.*, 390 U.S. 400, 401-02 (1968)).

to engage in or to permit sexual harassment.”<sup>163</sup> In other words, there was no preexisting right that the compensatory damages provision of the Civil Rights Act retroactively interfered with. These apparently inconsistent results beg the question of whether the first prong of the *Landgraf* test is sound.

## 2. Whether there is Clear Congressional Intent

Under the *Landgraf* test, if a statute is determined to have retroactive effect, a presumption against the retroactive application will be applied, absent clear congressional intent to the contrary.<sup>164</sup> The Court in *Landgraf* discerned Congress’s intent regarding the statute’s temporal scope by analyses of both the text and legislative history.<sup>165</sup> The *Landgraf* majority’s analysis of the text relied on familiar canons of statutory interpretation.<sup>166</sup> The Court concluded that the text did not indicate a congressional intent for the statute to apply retroactively.<sup>167</sup>

In discerning Congress’s intent, the *Landgraf* Court’s statutory interpretation was consistent with the theory of “intentionalism.”<sup>168</sup>

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163. *Landgraf*, 114 S. Ct. at 1510 (Blackmun, J., dissenting).

164. *Id.* at 1505.

165. *See supra* note 92.

166. For a compilation of canons of statutory construction, see William N. Eskridge, Jr., & Philip P. Frickey, *The Supreme Court 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 27, 97-108 (1994). For a lengthy treatment of statutory interpretation, see NORMAN J. SINGER, *SUTHERLAND STATUTORY CONSTRUCTION* (5th ed. 1992 & rev. ed. 1994). For a listing of contradictory canons of statutory construction juxtaposed to one another, see Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About how Statutes are to be Construed*, 3 VAND. L. REV. 395 (1950).

167. In sum, the Court reasoned that the several sections of the statute relied on by the petitioner could be interpreted either for or against retroactivity, therefore failing to meet the standard of clear intent. *Landgraf*, 114 S. Ct. at 1493-96.

168. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 326 (1990). This view purportedly comports with notions of the proper role of the judiciary in a representative democracy. In a system where the courts are perceived to be agents of the legislature, “requiring the courts to follow the legislature’s intentions disciplines judges by inhibiting judicial law-making, and in so doing seems to further democracy by affirming the will of elected representatives.” *Id.* *See also* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593 (1995).

As a theory of statutory interpretation, “intentionalism” shares with two other “grand theories of statutory interpretation”—“purposivism” and “textualism”—the fundamental premise that statutory interpretation must be conducted using a single legitimate category of source. Eskridge & Frickey, *supra*, at 321 n.2. Thus “intentionalism” requires courts to effectuate the legislature’s intent, “purposivism” requires the court to ascertain the legislature’s purpose, and “textualism” relies exclusively on the text of the statute. *Id.* at 326-41. In general, these three theories have been criticized

In accord with this theory, where the text of a statute is ambiguous, the Court attempts to discern the clear intent of Congress.<sup>169</sup>

Whether Congress's intent as to any statute is determinable and by what means is the subject of much debate.<sup>170</sup> Scholars have

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for interpreting statutes based on analysis of limited sources to the exclusion of other potentially relevant materials. *Id.* at 322.

169. *Landgraf*, 114 S. Ct. at 1501.

170. In recent years the subject of statutory interpretation has received much attention. See Hans W. Baade, *Time and Meaning: Notes on the Intertemporal Law of Statutory Construction and Constitutional Interpretation*, 43 AM. J. COMP. L. 319 (1995); James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1 (1994); Maxwell O. Chibundu, *Structure and Structuralism in the Interpretation of Statutes*, 62 U. CIN. L. REV. 1439 (1994); Sarah Rudolph Cole, *Continuation Coverage Under COBRA: A Study in Statutory Interpretation*, 22 J. LEGIS. 195 (1996); Anthony D'Amato, *The Injustice of Dynamic Statutory Interpretation*, 64 U. CIN. L. REV. 911 (1996); Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AM. U. L. REV. 127 (1994); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61 (1994); Melvin Aron Eisenberg, *Strict Textualism*, 29 LOY. L.A. L. REV. 13 (1995); William N. Eskridge, Jr. & Judith N. Levi, *Regulatory Variables and Statutory Interpretation*, 73 WASH. U. L.Q. 1103 (1995); William N. Eskridge, Jr., *The Case of the Speluncean Explorers: Twentieth-Century Statutory Interpretation in a Nutshell*, 61 GEO. WASH. L. REV. 1731 (1993); Lary Evans et al., *Congressional Procedure and Statutory Interpretation*, 45 ADMIN. L. REV. 239 (1993); Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism*, 33 HARV. J. ON LEGIS. 35 (1996); Carlos E. Gonzalez, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585 (1996); Sang Hui Michael Kim, *In re Alappat: A Strict Statutory Interpretation Determining Patentable Subject Matter Relating to Computer Software?*, 13 J. MARSHALL J. COMPUTER & INFO. L. 635 (1995); William S. Jordan, III, *Legislative History and Statutory Interpretation: The Relevance of English Practice*, 29 U.S.F. L. REV. 1 (1994); Bradley C. Karkkainen, "Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction, 17 HARV. J.L. & PUB. POL'Y 401 (1994); Michael P. Kenny & Teresa D. Thebaut, *Misguided Statutory Construction to Cover the Corporate Universe: The Misappropriation Theory of Section 10(B)*, 59 ALB. L. REV. 139 (1995); James P. Nehf, *Textualism in the Lower Courts: Lessons From Judges Interpreting Consumer Legislation*, 26 RUTGERS L.J. 1 (1994); Lori L. Outzs, *A Principled Use of Congressional Floor Speeches in Statutory Interpretation*, 28 COLUM. J.L. & SOC. PROBS. 297 (1995); Stephen A. Plass, *The Illusion and Allure of Textualism*, 40 VILL. L. REV. 93 (1995); William D. Popkin, *Law-Making Responsibility and Statutory Interpretation*, 68 IND. L.J. 865 (1993); A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 71 (1994); Robert K. Rasmussen, *A Study of the Costs and Benefits of Textualism: The Supreme Court's Bankruptcy Cases*, 71 WASH. U. L.Q. 535 (1993); Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593 (1995); Muriel Morisey Spence, *The Sleeping Giant: Textualism as Power Struggle*, 67 S. CAL. L. REV. 585 (1994); George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321 (1995); George H. Taylor, *Textualism at Work*, 44 DEPAUL L. REV. 259 (1995); James E. Westbrook, *A Comparison of the Interpretation of Statutes and Collective Bargaining Agreements: Grasping the Pivot of Tao*, 60 MO. L. REV. 283 (1995); Rebecca Hanner White, *The EEOC, The Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation*, 1995 UTAH L. REV. 51.

criticized "intentionalism" for assuming that there is a collective "intent" of the entire legislature, and that this intent is cognizable.<sup>171</sup> While alternative theories of statutory interpretation continue to inquire into the purpose of legislation,<sup>172</sup> these new theories tend to rely on more eclectic sources in an effort to discern the best legal result given the circumstances and context.<sup>173</sup> This "practical reasoning" approach to statutory construction urges that a court examine all relevant factors in reaching its conclusion.<sup>174</sup> Commentators often suggest that the Supreme Court in fact reaches its decision based on practical reasoning, and then justifies the result with traditional canons of statutory construction.<sup>175</sup>

### C. *An Alternative to the Landgraf Test*

In the context of judicial analysis of statutory retroactivity,

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For a list of books, articles, and other publications on statutory interpretation published between 1987 and 1992, see WILLIAM N. ESKRIDGE & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY*, Ch. 7 (Supp. 1992). For a thorough treatment of difficulties in the legislative problem-solving process itself, see Eric J. Gouvin, *Truth in Savings and the Failure of Legislative Methodology*, 62 U. CIN. L. REV. 1281, 1316-53 (1994).

At least one view of statutory construction asserts that the debate itself is essentially moot. According to the Neo-Realist view, judicial opinions expressly based on canons of statutory construction actually represent *post hoc* justifications for decisions reached on other grounds. Thus, the written opinion of an appellate court does not represent the actual reasons for the decision, nor the reasoning process of the judge. See, e.g., Robert J. Martineau, *Craft and Technique, Not Canons and Grand Theories: A Neo-Realist View of Statutory Construction*, 62 GEO. WASH. L. REV. 1 (1993).

171. Eskridge & Frickey, *supra* note 168, at 326. See Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930) ("That the intention of the legislature is undiscoverable in any real sense is almost an immediate inference from a statement of the proposition."). See also Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983); Kenneth A. Shepsle, Comment, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

172. Robert J. Araujo, S.J., *The Use of Legislative History in Statutory Interpretation: A Look at Regents v. Bakke*, 16 SETON HALL LEGIS. J. 57 (1992); Eskridge & Frickey, *supra* note 168; Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533 (1992); Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1 (1991).

173. Farber, *supra* note 172; William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

174. See Eskridge & Frickey, *supra* note 168, at 323.

175. Eskridge & Frickey, *supra* note 168, at 323 (commenting that "practical reasoning . . . seems to describe what the Court actually *does* when it interprets a statute"). The Neo-Realists, who maintain that judicial opinions represent *post hoc* justifications for decisions reached on other grounds, agree that the "practical reasoning" approach most closely approximates the actual decision-making process of appellate courts. See Martineau, *supra* note 170, at 32.

commentators have long held a suspicion that court decisions ostensibly based upon distinctions of vested and nonvested rights were in fact reached on other grounds.<sup>176</sup> Under this theory, the application of the presumption against retroactivity is perceived to be the end result of "the usual process of statutory construction—the balancing of policies which may militate in favor of preserving an allegedly protected interest against" the interests of effectuating the purpose of the statute.<sup>177</sup> The equitable considerations of fairness, reliance and expectations that the *Landgraf* opinion ostensibly endorsed as relevant factors will inevitably be considered as policies in favor of preserving an interest. Therefore, this "balancing of policies" accounts for circumstances in a given case that inspired the rule against retroactivity to begin with.

Unjust results are likely to occur more often when the rule against retroactivity is applied without an examination of whether any of the reasons that underlie the presumption inhere in the case at issue.<sup>178</sup> Consequently, commentators have argued that the retroactivity decision should be based on "whether applying the statute at issue to a given case implicates any of the dangers of retroactivity: unsettling expectations, depriving parties of notice, or targeting vulnerable groups."<sup>179</sup>

Analysis of whether a statute should apply retroactively necessarily involves both an examination of the statute and the rights potentially affected.<sup>180</sup> When a statute is unclear as to its temporal

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176. See Smith, *supra* note 147, at 246. It has been suggested that, when distinguishing between vested and non-vested rights, courts are actually providing *post hoc* justification for a decision reached on some other basis. "It is submitted that the distinction between vested and non-vested rights . . . is of use primarily as a basis on which to classify decisions after they have already been reached on other grounds." *Id.*

The Neo-Realists maintain that there is a clear distinction in the appellate process between decision-making, which occurs when the judges hearing an appeal confer on how the case ought to be decided, and decision justifying, which is essentially what the published opinion is. See Martineau, *supra* note 170, at 25. Thus, judicial opinions rarely reflect the thought processes of the judges in reaching a decision. The opinion "is, rather, a reasoned justification of the decision prepared after the decision is made." *Id.* at 27.

177. Greenblatt, *supra* note 83, at 551.

178. The presumption against retroactivity "fails to involve courts in any examination of the effects of particular laws and instead applies a stringent and unyielding test. Statutes differ in purpose and effect, yet the clear-statement rule treats them all identically." *Hicks v. Brown Group, Inc.*, 982 F.2d 295, 299 n.3 (8th Cir. 1992) (Heaney, J., dissenting). Where retroactive application of a statute would serve justice, the presumption against retroactivity "uncritically sanctions harsh results." *Id.*

179. Michele A. Estrin, Note, *Retroactive Application of the Civil Rights Act of 1991 to Pending Cases*, 90 MICH. L. REV. 2035, 2069 (1992).

180. "[A]nalysis of retroactivity cannot be dissociated from analysis of the right

scope, the "test" involves evaluating whether the strength of the interest affected warrants interpreting the statute prospectively.<sup>181</sup> It follows that the greater the evidence of legislative purpose implying retroactive application of the statute, the stronger the interest affected must be to require prospective application.

While the Supreme Court in *Landgraf* noted that these equitable considerations should be taken into account, the Court failed to expressly base its decision on them. As a result, the Court's reasoning was unclear.<sup>182</sup> In contrast, commentators posit that if courts "focus on actual objections to retroactivity and whether these objections inhere in a particular statute [their] inquiry will lead to well-reasoned and inherently more just opinions."<sup>183</sup>

This analytical approach of focusing on the actual objections to a retroactive application of a statute essentially expresses the general "practical reasoning" approach towards statutory interpretation, as applied in the specific context of retroactivity. Consideration of the impact that the retroactive application of a statute will have on interests of reliance or expectation interests, in light of the legislative objectives, comports with the practical reasoning approach—examining all relevant material to discern the best legal result given the context.<sup>184</sup> This approach is more flexible

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which is destroyed and of the statute which is invoked to destroy it." Greenblatt, *supra* note 83, at 550.

181. *Id.*

182. See *supra* note 89 and accompanying text.

183. Estrin, *supra* note 179, at 2069.

184. "Practical reason, unfortunately, is easier to invoke than to define." See Farber, *supra* note 172, at 539. The pragmatic approach of practical reason may easily be mistaken as an *ad hoc* method that attempts only to reach a just outcome on the facts of a particular case. Thus, practical reason has been criticized as incoherent, subjective, and unpredictable. *Id.* at 534. Adherents to the practical reason school, however, explain that the method is not one of *ad hoc* decision-making. *Id.* at 539. "Rather, it means a rejection of the view that rules and precedents in and of themselves dictate outcomes." *Id.*

The practical reason theory is used as an analytical framework to interpret statutes by developing their contextual meaning, rather than deducing a fixed rule. As an approach to legal problems, practical reason includes consideration of "history and context; a desire to avoid abstracting away the human component in judicial decisionmaking; an appreciation for the complexity of life; some faith in dialogue and deliberation; a tolerance of ambiguity, accommodation, and tentativeness, but a skepticism of rigid dichotomies; and an overall humility." Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1646 (1987).

Accordingly, the practical reason approach to statutory construction requires the consultation of all sources relevant to the interpretation of a statute. "These sources include the statutory text, legislative expectations, statutory purposes, evolution of the statute over time, and coherence of the statute with the broader public law." Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal*

than the two-part *Landgraf* test, because it may include consideration of circumstances beyond the scope of a traditional "intentionalism" approach to statutory construction. Hence, the two inquiries involved in the *Landgraf* test are important factors under the practical reasoning approach, but they are not exclusive of other considerations.

Because a practical reasoning approach approximates more closely the actual process that courts use in interpreting a statute,<sup>185</sup> the legal analysis that follows employs a practical reasoning approach. Therefore, rather than applying the two-part *Landgraf* test of whether the statute is retroactive in effect and whether there is clear congressional intent, this Note will analyze the issue in accord with the practical reasoning based approach to analyzing statutory retroactivity. It will examine (1) the strength of the interest in exclusive cable franchise agreements, and (2) the evidence of the legislative objectives in enacting section 541(a), in light of relevant facts.

#### V. SHOULD SECTION 541(a) OF THE 1992 CABLE ACT APPLY TO EXISTING EXCLUSIVE FRANCHISES?

This analysis concludes that section 541(a) presumptively applies retroactively to preexisting exclusive franchises. The presumption may be rebutted by circumstances that warrant the protection of exclusivity in a particular case. Part A demonstrates that the strength of the interest in exclusivity varies depending on the circumstances of the given franchise. In general, these circumstances include the extent that natural monopoly conditions exist, and whether consumer interests are being adequately served. The existence of natural monopoly conditions militate in favor of exclusivity, while poor consumer service militates in favor of competition. Independent of these conditions, the interest in exclusivity in cable franchising is weak because cable providers lack any justifiable reliance interest in federal law,<sup>186</sup> and because public policy concerns militate against exclusivity in the context of cable television.<sup>187</sup> In addition, potential violations of antitrust law and the First Amendment favor retroactive application.

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*Indian Law*, 78 CAL. L. REV. 1137, 1208 (1990). The resulting interpretation is therefore "likely to be the product of congeries of supporting, interactive arguments, rather than a single, deductive conclusion from one source of meaning." *Id.* at 1209.

185. See Martineau, *supra* note 170, at 32.

186. See *infra* part V.A.1.

187. See *infra* part V.A.2.



Relying on the text of the Cable Television Consumer Protection and Competition Act, Part B of this analysis demonstrates that the purpose of the Act is to remedy the situation created by the 1984 Cable Act—unregulated monopoly. Part B concludes that the Act is designed to protect consumer interests harmed by the effects of unregulated monopoly, by promoting managed competition. In Part C, the legislative history of the Act is examined. Part C concludes that applying section 541(a) to negate preexisting exclusive franchises is consistent with the objectives of the Act.

The analysis concludes that a presumption in favor of retroactivity exists regarding section 541(a), based on an assessment of the strength of the interest in exclusivity, the legislative purpose of the Act in light of the history of the cable industry, and an analysis of the legislative history of the Act. However, exclusivity of cable franchises is not negated per se. Part D explains that the clause “unreasonably refuse to grant” in section 541(a)(1) means that exclusivity is negated where (1) a second cable provider applies for a franchise and (2) no sufficient reasons exist to justify the exclusivity of the preexisting franchise to the extent that a grant of an additional franchise would be “unreasonable.” Part D explains the application of the “unreasonable refusal” standard and the circumstances that warrant protection of the interest in exclusivity in a given case.

A. *Assessing the Strength of the Interest in Exclusivity and Section 541(a)*

A “new provision [that] attaches new legal consequences to events completed before its enactment” is retroactive in effect.<sup>188</sup> Section 541(a), if interpreted to permit the awarding of second franchises regardless of exclusive preexisting franchises, would in effect negate exclusivity provisions that were agreed to prior to the enactment of the 1992 Cable Act. Under the practical reasoning approach, the starting point for determining whether section 541(a)(1) applies retroactively is to ascertain the strength of society’s interest in exclusivity. Several factors indicate that the general interest in exclusivity is not compelling. First, cable providers have long been on notice that the cable industry was subject to federal regulation. Therefore, cable providers could not reasonably rely on franchising exclusivity as impervious to regulation. Second, public policy disfavors exclusive trade agreements that unreasonably re-

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188. *Landgraf v. USI Film Prods.*, 114 S. Ct. 1483, 1499 (1994).

strain trade. Exclusive cable franchises, in effect, often test if not exceed the limits of public policy. Third, exclusive franchises may also violate the First Amendment.

While society's interest in exclusive cable franchises in general is therefore insufficient to require interpreting section 541(a) prospectively only, the existence of specific conditions in a particular franchise may justify exclusivity. The strength of the interest in exclusivity in a particular franchise agreement is therefore dependent on the surrounding circumstances.<sup>189</sup>

### 1. Reliance, Predictability and Stability

The exclusivity of a franchise agreement is contractual. Contract rights are recognized under *Landgraf* to be most often afforded a presumption against retroactivity.<sup>190</sup> To be consistent with the practical reasoning approach, however, the focus of the inquiry is not whether exclusivity is contractual, but whether the reasons for protecting contract rights inhere in exclusive cable franchises. The importance of maintaining predictability and stability in the area of contract and property rights derives from the nature of our free market economy where the acquisition of wealth constitutes the primary incentive to work.<sup>191</sup> Frequent legislative changes that disrupt relied-upon contractual or property expectations serve to undermine our economic system. Accordingly, the Supreme Court has often construed statutes prospectively so as not to disturb contract and property rights.<sup>192</sup>

Conversely, legislatures are not to be absolutely constricted in their lawmaking functions by preexisting contracts. The Supreme Court has noted that "[i]mmunity from federal regulation is not gained through forehanded contracts."<sup>193</sup> In the case of interstate commerce, the Court has been particularly clear that Congress will not be impeded in legislating because of private contracts.<sup>194</sup> It fol-

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189. See Eskridge & Frickey, *supra* note 168, at 323.

190. *Landgraf*, 114 S. Ct. at 1500.

191. See Greenblatt, *supra* note 83, at 567.

192. *Landgraf*, 114 S. Ct. at 1500 (citing *United States v. Security Indus. Bank*, 459 U.S. 70, 79-82 (1982)); *Claridge Apartments Co. v. Commissioner*, 323 U.S. 141, 164 (1944); *United States v. St. Louis, S.F. & T.R. Co.*, 270 U.S. 1, 3 (1926); *Holt v. Henley*, 232 U.S. 637, 639 (1914); *Union Pac. R.R. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913); *Twenty per Cent. Cases*, 87 U.S. (20 Wall.) 179, 187 (1874); *Sohn v. Waterson*, 84 U.S. (17 Wall.) 596, 599 (1873); *Carroll v. Carroll's Lessee*, 57 U.S. (16 How.) 275 (1853).

193. *Fleming v. Rhodes*, 331 U.S. 100, 107 (1947).

194. *Sproles v. Binford*, 286 U.S. 374, 390-91 (1932). The Court in *Sproles* stated:

lows that the interest in cable franchise exclusivity is subordinate to the authority of the legislature. The question presented then regards the strength of the exclusivity interest.<sup>195</sup>

"[P]redictability and stability" are principles central to contract rights.<sup>196</sup> Thus, an important consideration in examining the strength of the interest of cable franchisees in the exclusivity of their agreement is the reasonable extent to which the franchisee relied on governmental noninterference with their contract rights. As cable franchising agreements were entered into with government authorities, the cable franchisees might expect to reasonably rely on their agreements as countenanced by law.

Nonetheless, while cable franchisees entered into agreements in reliance on the then existing law, "it [was] clear that by 1972, the FCC had asserted its rulemaking preemptive power over all the state actions in regulating the cable industry; its term regulation served as notice to the cable industry that it was subject to the potential exercise of preemptive federal authority."<sup>197</sup> Thus, any cable franchise agreement entered into after 1972 may be viewed as one made in contemplation of federal regulation.<sup>198</sup> Under such notice, the extent to which cable franchisees may have reasonably relied on the fact that the government would not interfere with their contractually obtained rights is not substantial.

Further, municipalities and cable franchisees bargained for their agreements under the same reliance upon federal law. Thus, municipalities were relying that the federal government would not subsequently interfere with their contractually obtained rights. However, that is precisely what occurred when Congress enacted

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With respect to the power of Congress in the regulation of interstate commerce, this court has had frequent occasion to observe that it is not fettered by the necessity of maintaining existing arrangements which would conflict with the execution of its policy, as such a restriction would place the regulation of interstate commerce in the hands of private individuals and withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their agreements.

*Id.* (citations omitted).

195. "[T]he court must determine whether at the date of enactment the event or events which have occurred up to that point create a sufficiently strong interest to justify an interpretation that the legislature could not in the absence of specific language have intended to destroy or modify such interest." Greenblatt, *supra* note 83, at 550.

196. *Landgraf*, 114 S. Ct. at 1500.

197. *James Cable Partners v. City of Jamestown*, 822 F. Supp. 476, 478 (M.D. Tenn. 1993), *aff'd*, 43 F.3d 277 (6th Cir. 1995).

198. This is analogous to *Sproles*, 286 U.S. at 390 (1932), where the Court stated that "[c]ontracts which relate to the use of the highways must be deemed to have been made in contemplation of the regulatory authority of the state." *Id.*

the 1984 Cable Act and limited franchising authorities' power to regulate cable providers.<sup>199</sup> Moreover, the 1984 Act served as additional notice that the cable industry was subject to federal regulation.

Thus, the cable industry's interest in reliance in general is not substantial. The salient exception, however, is exclusive franchises entered into after the 1984 Act was enacted, because they were not bargained for under the assumption that municipalities possessed the power to regulate rates. In these circumstances, the cable franchisee's interest in exclusivity may be stronger because the municipality was presumably aware of the limits on its regulatory power, and therefore had some opportunity to bargain for other provisions safeguarding consumer interests.

## 2. Public Policy Against Exclusivity

The strength of the interest in exclusivity, grounded in the necessity to protect contractual rights, is eroded by the public policy against exclusive agreements. The Restatement (Second) of Contracts, section 186(1), states that "[a] promise is unenforceable on grounds of public policy if it is unreasonably in restraint of trade."<sup>200</sup> The Restatement defines a promise to be in "restraint of trade if its performance would limit competition."<sup>201</sup> A promise in restraint of trade is unenforceable if it is "unreasonably detrimental to the smooth operation of a freely competitive private economy."<sup>202</sup> However, the unreasonableness of a given agreement must be examined in light of "the promisee's legitimate interests, the hardship that it imposes on the promisor, and the likely injury to the public."<sup>203</sup> Thus, public policy disfavors exclusive agreements when they are likely to injure consumer interests.

The Restatement essentially expresses the public policy that guides antitrust law.<sup>204</sup> Judge Posner has discussed the application

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199. See *supra* part I.A.3 for a discussion of the 1984 Cable Communications Policy Act.

200. RESTATEMENT (SECOND) OF CONTRACTS § 186(1) (1981).

201. *Id.*

202. RESTATEMENT (SECOND) OF CONTRACTS § 186 cmt. a (1981).

203. *Id.*

204. It is, of course, misleading to speak of antitrust law as if it were uniform or static. Distinctions and differences are pervasive in antitrust law due to different jurisprudential approaches, ranging from the common law to the law and economics perspective. HOVENKAMP, *supra* note 20, at 48-68. In addition, the implementation of antitrust law varies with changes in political leadership. *Id.* at 68. Nonetheless, the general common law policy against anticompetitive conduct that is expressed in the

of antitrust principles in the context of exclusive cable franchises.<sup>205</sup> Circumstances that may justify granting an exclusive franchise in compliance with antitrust law include whether the particular geographic cable market is a natural monopoly and whether an exclusive franchise advances consumer interests.<sup>206</sup> Several courts have addressed the natural monopoly question in the cable television context.<sup>207</sup>

The proposition that cable was a natural monopoly initially justified granting exclusive franchises.<sup>208</sup> Whether cable is actually a natural monopoly has since been strongly challenged and debated.<sup>209</sup> One premise of the natural monopoly argument initially relied upon to justify exclusive franchising was that the cable industry exhibits economies of scale. This argument states that cable providers have a strong incentive to acquire all subscribers in a given area as a means of reducing average cost of providing cable per customer and increasing profits.<sup>210</sup> The incentive is purportedly so strong that competition will lead inexorably to a single provider. Competition is therefore perceived as futile, yielding no long term benefits to consumers in the long run, and wasting resources and causing disruption in the short run.<sup>211</sup> However, current data reveals that competition as well as the mere threat of competition

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Restatement predated federal legislation. The most salient difference between the common law and federal antitrust law is that the common law merely renders anticompetitive agreements unenforceable, while federal antitrust law makes them affirmatively illegal. *Id.* at 52.

205. *Omega Satellite Prods. Co. v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982).

206. *Id.* at 127. This presumes that there is no state action immunity from federal antitrust liability. See generally *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982).

207. See *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986); *Community Communications*, 455 U.S. 40; *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987); *Tele-Communications, Inc. v. United States*, 757 F.2d 1330 (D.C. Cir. 1985); *Omega Satellite Prods.*, 694 F.2d 119; *Berkshire Cablevision, Inc. v. Burke*, 571 F. Supp. 976 (D.R.I. 1983), *vacated*, 773 F.2d 382 (1st Cir. 1985).

208. See *supra* part I.

209. See, e.g., ALBERT K. SMILEY, DIRECT COMPETITION AMONG CABLE TELEVISION SYSTEMS (U.S. Dept. of Justice, Antitrust Division, Discussion Paper, v. EAG 86-9, 1986); Brenner, *supra* note 15; Hazlett, *supra* note 15.

210. The cost of adding each additional subscriber is minimal once the cable grid is installed. Thus, with each additional subscriber, the average cost (the amount of money invested in the cable grid divided by the number of subscribers) per subscriber diminishes, and the margin of profit increases.

211. See *supra* part I.A.1 for a discussion of natural monopoly.

in a cable franchise area leads to lower prices and better service.<sup>212</sup> Indeed, the Senate Commerce Committee agreed with this conclusion, finding that costs to subscribers were significantly lower in areas subject to service by more than one cable provider.<sup>213</sup>

Another argument offered in support of the natural monopoly theory was that the cable industry is "capital intensive." Consequently, cable providers should be given the opportunity to recoup their initial investment while protected from the threat of larger "overbuilders" who might be in an economic position to sacrifice short term losses in the interest of underselling the competition and capturing the market.<sup>214</sup> As a logical corollary to this argument, exclusivity should be granted for some limited period reflecting a reasonable time necessary for a cable provider to stabilize its position. However, the duration of many exclusive franchises by far exceeded any conceivably reasonable period.<sup>215</sup> Thus an interest in exclusivity may be reasonable for a limited period of time. What constitutes reasonable duration would seem to be dependent on the circumstances of the case relating to the time necessary for the provider to recoup its investment.

Finally, exclusive franchises were perceived to be in the consumer interest because it was believed that a single provider could deliver the cheapest service.<sup>216</sup> However, consumer interests appeared to suffer sharply as subscription rates rose and the quality of service decreased during the period after the 1984 Cable Act.<sup>217</sup> Indeed, by 1991, consumer dissatisfaction with cable television service had reached an all-time high.<sup>218</sup>

In short, there is a strong policy against exclusive trade agreements, as expressed in the Restatement and in antitrust law. Yet in the cable industry the widely held perception of cable as a natural monopoly traditionally ameliorated these policy concerns. Scholars and policy makers, however, have begun to question and refute this perception.

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212. See Hazlett, *supra* note 15, at 1371-75.

213. S. REP. NO. 92, *supra* note 5, at 14, *reprinted in* 1992 U.S.C.C.A.N. at 1146.

214. See HAMBURG, *supra* note 26.

215. Some franchises were agreed to for periods of 20-60 years. See Copple, *supra* note 38, at 23-24.

216. See *supra* part I.A.1 for a discussion of economies of scale.

217. See *supra* part I.A.4.

218. See Arnesen & Blizinsky, *supra* note 43, at 640-41.

### 3. The First Amendment

An additional consideration regarding the strength of the interest in exclusive franchises concerns First Amendment speech issues relevant to exclusive cable franchising.<sup>219</sup> Cable providers seeking access to markets argue that municipalities impede free speech by limiting the number of cable providers. In *City of Los Angeles v. Preferred Communications, Inc.*,<sup>220</sup> the Supreme Court ruled that cable providers are speakers under the First Amendment.<sup>221</sup> In *Turner Broadcasting System, Inc. v. Federal Communications Commission*,<sup>222</sup> the intermediate scrutiny standard was applied to free speech questions involving cable television.<sup>223</sup> Under intermediate scrutiny, a "regulation will be sustained if 'it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'"<sup>224</sup> Municipalities have argued that the natural monopoly conditions of the cable industry justify government limitations on the number of cable providers through exclusive franchises and that an exclusive franchise is thereby constitutional.<sup>225</sup>

Courts have reached different conclusions over whether the circumstances in various franchise areas warrant the granting of an exclusive franchise in light of the First Amendment.<sup>226</sup> In these cases, whether the First Amendment was violated by franchising

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219. See Jeff Gray, Note, *Turner Broadcasting System, Inc. v. FCC: The Need for a New Approach in First Amendment Jurisprudence of the Cable Industry*, 29 U.S.F. L. REV. 999 (1995); Matthew D. Segal, Recent Development, *The First Amendment and Cable Television: Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445 (1994), 18 HARV. J.L. & PUB. POL'Y 916 (1995).

220. 476 U.S. 488 (1986).

221. *Id.*

222. 114 S. Ct. 2445 (1994).

223. *Id.* at 2469.

224. *Id.* (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

225. See, e.g., *Century Fed., Inc. v. City of Palo Alto*, 648 F. Supp. 1465, 1469 (N.D. Cal. 1986).

226. For courts holding that the First Amendment was violated, see *Cox Cable Communications, Inc. v. United States*, 774 F. Supp. 633 (M.D. Ga. 1991), *remanded by* 992 F.2d 1178 (11th Cir. 1993); *Pacific W. Cable Co. v. City of Sacramento*, 672 F. Supp. 1322 (E.D. Cal. 1987); *Group W Cable, Inc. v. City of Santa Cruz*, 669 F. Supp. 954 (N.D. Cal. 1987); *Century Fed.*, 648 F. Supp. 1465. For courts holding that the Constitution was not violated, see *Chicago Cable Communications v. Chicago Cable Comm'n*, 879 F.2d 1540 (7th Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990); *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987).

practices turned largely on the same factual questions pertinent to antitrust inquiries—i.e., whether a natural monopoly existed.<sup>227</sup> For instance, the physical constraints<sup>228</sup> relevant to granting cable licenses, if they in fact exist, may serve as a substantial interest of the municipality justifying the limitations on franchising.<sup>229</sup> Proponents of this argument posit that, due to the space required for the installation of cable systems, the city has a legitimate interest in limiting the number of cable providers to avert excessive disruption of public areas.<sup>230</sup> Cities, however, have not always been able to meet the burden of demonstrating that granting an exclusive franchise furthers their substantial interests in regulating the disruption of the public domain.<sup>231</sup> In such cases, an interest in exclusivity must yield to the First Amendment.

#### B. *Legislative Purpose of Section 541(a)*

No single element of the text conclusively indicates that section 541(a) was intended to apply to exclusive preexisting franchises. The totality of text, however, indicates that the purpose of the legislation was to advance consumer interests by promoting managed competition and regulating rates. From this general legislative purpose it may be inferred that section 541(a) should be applied retroactively when the circumstances require—primarily where the absence of competition harms consumer interests, and no conditions exist that justify exclusivity.

The Supreme Court has often stated that the “starting point for interpretation of a statute ‘is the language of the statute itself.’”<sup>232</sup> Section 541(a) states that “a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise.”<sup>233</sup> Thus the first clause of section

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227. See *supra* note 226 for cases discussing these issues.

228. In the case of cable, the term “physical restraints” refers to the limitation on how many wires could be run and poles utilized due to space limitations.

229. *Omega Satellite Prods. Co. v. City of Indianapolis*, 694 F.2d 119, 125 (7th Cir. 1982). “In the very nature of things there must be some limit to the number of telephone and light companies that can serve the public by the use of the streets of a town or a city for the location of poles, wires, and necessary appliances.” *Id.* (quoting *State ex rel. Evansville Tel. Co. v. Stickelman*, 105 N.E. 777, 779 (Ind. 1914)).

230. *Id.*

231. See, e.g., *Century Fed., Inc. v. City of Palo Alto*, 648 F. Supp. 1465, 1478 (N.D. Cal. 1986).

232. *Landgraf v. USI Film Prods.*, 114 S. Ct. 1483, 1508 (1994) (Blackmun, J., dissenting) (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 838 (1990)).

233. 47 U.S.C. § 541(a) (1994).



541(a) expressly prohibits granting exclusive franchises. The meaning of the second clause, which proscribes "unreasonable" refusals to grant second franchises, is less clear. The question of whether section 541(a) may operate to negate preexisting exclusivity turns on the definition of "unreasonable." Indeed, the court in *James Cable* concluded that a preexisting exclusive franchise is a perfectly "reasonable" basis to refuse to award another franchise.<sup>234</sup>

The text of a provision in a statute is often constructed with reference to the larger statutory scheme as a whole.<sup>235</sup> Thus, an ambiguity in the intended definition of a term may be resolved by discerning the general purposes and policies advanced by the Act as a whole. This Note will demonstrate that, based on the express findings of Congress, the stated purpose of the Act, and inferences drawn from other relevant sections, an "unreasonable refusal to grant a second franchise" means a refusal that will injure consumer interests by impeding competition, or a refusal that will harm legitimate interests in exclusivity.

### 1. Congressional Findings

Section 521 of the Act indicates the general issues that Congress sought to address by enacting the legislation. In section 521(a) of the Act, entitled "Findings," Congress explicated the unfavorable market conditions faced by consumers in the cable industry, such as the monopoly held by most cable systems that resulted in "undue market power" of cable operators as compared to consumers<sup>236</sup> and the consequent dramatic increases in cable rates.<sup>237</sup> Congress recognized that the monopolistic conditions had arisen for a number of legitimate reasons.<sup>238</sup> Regardless, the injurious effect of monopoly conditions on consumers compelled the enactment of the legislation. Congress promulgated as policy that consumer interests be protected where effective competition in the market was absent.<sup>239</sup> The primary means of protecting consumer interests were stated as "ensur[ing] that cable television operators do not have undue market power vis-a-vis video programmers and con-

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234. *James Cable Partners v. City of Jamestown*, 43 F.3d 277, 280 (6th Cir. 1995).

235. *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 94-95 (1993).

236. 47 U.S.C. § 521(a)(2) (1994).

237. § 521(a)(1).

238. § 521(a)(2). Among the reasons cited were "local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area." *Id.*

239. § 521(b)(4).

sumers.”<sup>240</sup> Thus, section 521 indicates that section 541(a) should be interpreted to effectuate the reduction of the market power possessed by cable providers.<sup>241</sup>

## 2. Other Provisions Illustrative of Legislative Objectives

Reference to other provisions of the Act assist in the interpretation of section 541(a). Section 548 deals with problems of unfair competition marked by exclusive contracts between video programmers and providers.<sup>242</sup> This section comports with the express purposes of eliminating undue market power illustrated in section 521.<sup>243</sup>

Section 548(h)(1) narrowly prescribes the context where preexisting exclusive franchises may be affected.<sup>244</sup> This provision may be interpreted as either limiting the retroactive application of the section, or affirmatively granting the statute a limited retroactive scope. The absence of any such express provision concerning section 541(a)'s temporal scope may similarly indicate either that Congress did not intend to limit section 541(a)'s retroactive application, or that Congress did not intend to affirmatively grant any retroactive scope.<sup>245</sup> While it is unclear what the significance is of the absence of a provision similar to section 548(h)(1) in section 541(a), section 548 reiterates that the purpose of the Act is to promote consumer interests by facilitating managed competition.

The last textual reference bearing on retroactivity is section 541(f), which states that no provision of the 1992 Cable Act shall be

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240. § 521(b)(5).

241. For a discussion of what value “findings” sections of legislation hold towards understanding the legislation, see Gouvin, *supra* note 170, at 1327-34. Professor Gouvin notes that “findings” sections do not necessarily reflect the actual problems which the legislation addresses. He explains that “[t]he disparity between the official findings and the real problems evidences the drafter’s efforts to translate the real problems into politically acceptable language.” *Id.* at 1329.

242. *See* § 548.

243. *Id.*

244. § 548(h)(1). For a discussion of the application of this section to existing contracts, see Allard, *supra* note 54, at 327-29. Section 548(h)(1) states:

Nothing in this section shall affect any contract that grants exclusive distribution rights to any person with respect to satellite cable programming and that was entered into on or before June 1, 1990, except that the provisions of subsection (c)(2)(C) of this section shall apply for distribution to persons in areas not served by a cable operator.

§ 548(h)(1).

245. In the absence of any other indication of congressional intent, a similar problem of interpretation in *Landgraf* was resolved in favor of the presumption against retroactivity. *Landgraf v. USI Film Prods.*, 114 S. Ct. 1483, 1494 (1994).

interpreted to prevent a local or municipal franchising authority from operating its own franchise, regardless of other franchises granted by the authority.<sup>246</sup> Section 541(f)'s proscription specifies that interpretations of the Act which would prohibit municipalities from providing cable services are in violation of section 541(f) "notwithstanding the granting of *one or more franchises* by such franchising authority."<sup>247</sup> As the prohibition does not expressly refer to the granting of an "*exclusive franchise*," it does not assist in interpreting section 541(a).

In sum, the text of section 541 alone does not provide a clear expression of whether "unreasonable refusal to grant a second franchise" applies where a preexisting exclusive franchise exists. The text of the Act as a whole, however, does state a strong policy in favor of managed competition as a means to promoting consumer interests.

### C. *Legislative History*<sup>248</sup>

The legislative history of the 1992 Cable Act demonstrates that section 541(a) is applicable to preexisting exclusive franchises. The history illustrates that preexisting exclusive franchises were in the contemplation of Congress when enacting section 541(a). The Committee Reports also illuminate the meaning of the clause "unreasonably refuse to grant a second franchise" in section 541(a).

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246. See *supra* note 128 for the text of § 541(f)(1). The *James Cable* court held that it was an exclusive franchise, and not a prospective interpretation of § 541(a), that prevented the municipal authority from operating its own franchise. *James Cable Partners v. City of Jamestown*, 43 F.3d 277, 280 (6th Cir. 1995). The court's reasoning is problematic because it presupposes that § 541(a) is interpreted to operate prospectively so as not to effect the enforceability of an exclusivity provision. In other words, an exclusive franchise to which a municipality is a party may restrict the municipality from operating its own franchise only if the exclusivity itself is enforceable. The exclusivity of the franchise is enforceable only if § 541(a) is interpreted prospectively, so that refusing to grant a second franchise due to a preexisting exclusive franchise does not constitute an "unreasonable refusal to grant a second franchise."

The court reasoned that "[e]ven if [§ 541(a)] did not exist," the municipality would be prohibited from operating a competing franchise because of the enforceability of the exclusivity provision. *Id.* Section 541(a) exists, and the enforceability of an exclusivity provision is contingent upon its interpretation. Consequently, as a provision of the Act, if § 541(a) is interpreted to operate prospectively and that interpretation prohibits a municipal authority from operating as a cable provider, it violates § 541(f).

247. § 541(f)(1) (emphasis added).

248. Legislative history may be used to rebut or confirm a statute's plain meaning or to clarify ambiguities. See Eskridge, *supra* note 92, at 626. See also Susan G. Fentin, Note, *Finding Middle Ground Between Opportunity and Opportunism: The "Original Source" Provision of 31 U.S.C. § 3730(e)(4)*, 17 W. NEW ENG. L. REV. 255, 285-90 (1995).

Finally, the legislative history confirms a congressional purpose to address the problems created by the 1984 Cable Act. Of the voluminous materials constituting the legislative history of the 1992 Cable Act,<sup>249</sup> the Conference Committee report and the Senate Commerce Committee report provide the most authoritative statements pertinent to section 541(a) of the Act.<sup>250</sup> According to the Commerce Committee report, the purpose of the 1992 Act was to promote competition in the cable industry, in response to the undue market power possessed by the cable industry and the detrimental effect that this circumstance had on consumers.<sup>251</sup> The Senate Commerce Committee report noted that most consumers face a single cable provider, who, by virtue of its monopoly, is permitted to provide poor service yet retain customer patronage.<sup>252</sup> The Senate Commerce Committee reported that competition between cable systems is beneficial, and franchising authorities should accordingly be encouraged to award second franchises.<sup>253</sup> However, the Committee recognized that "this provision alone is not going to result in overnight competition."<sup>254</sup> An inference may be drawn from this admission that the drafters did not intend section 541(a) to apply retroactively. The Committee's concession that competition will not be effectuated "overnight" may indicate an awareness of the delayed effect the statute would have, attributable to the existence

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249. See Allard, *supra* note 54, at 307-08.

250. Scholars of the practical reason school have recognized a hierarchy of the evidentiary value of various sources of legislative history, based on the sources' comparative reliability. See Eskridge, *supra* note 92, at 636. Committee reports are relied upon most often by the Court, as they are considered to represent "the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." See Eskridge, *supra* note 92, at 637 (citing Carro & Brann, *The U.S. Supreme Court & the Use of Legislative Histories: A Statistical Analysis*, 22 JURIMETRICS 294 (1982)). Other forms of legislative history afforded less probative value are sponsor statements, rejected proposals, floor and hearing debate, views of nonlegislator drafters, legislative inaction and subsequent legislative history, in that order of importance. See Eskridge, *supra* note 92, at 636.

251. S. REP. NO. 92, *supra* note 5, at 1, reprinted in 1992 U.S.C.C.A.N. at 1133.

252. See *supra* note 58 and accompanying text.

253. S. REP. NO. 92, *supra* note 5, at 14, reprinted in 1992 U.S.C.C.A.N. at 1146.

The Senate Commerce Committee stated that:

Based on the evidence in the record taken as whole, it is clear that there are benefits from competition between two cable systems. Thus, the Committee believes that local franchising authorities should be encouraged to award second franchises. Accordingly, S.12 [the Committee's report] as reported, prohibits local franchising authorities from unreasonably refusing to grant second franchises.

*Id.*

254. *Id.*

of preexisting exclusive contracts. Conversely, the statement may simply have been in recognition that the passage of the legislation would not automatically trigger large-scale entry into the cable provider market, or that in many markets second franchisees will not seek entry despite availability. Thus, the report of the Senate Commerce Committee confirms that the purpose of the Act is to promote competition, yet fails to clearly indicate whether section 541(a) ought to be applied retroactively.

The Conference Committee report, unlike the Senate Committee report, does give an indication of the intended application of section 541(a):

The conferees believe that exclusive franchises are directly contrary to federal policy and to the purposes of S. 12, which is intended to promote the development of competition. Exclusive franchises artificially protect the cable operator from competition. Moreover, *at the time most of the exclusive franchises were awarded*, local authorities had the power to regulate the rates for basic cable service. However, the 1984 Cable Act repealed local authorities' ability to regulate rates.<sup>255</sup>

The Committee makes specific reference to exclusive franchises awarded *prior* to the enactment of the statute, underscoring that the franchising authorities' ability to regulate the cable provider was a basic element of those exclusive agreements. In the absence of that regulatory authority, competition must exist to protect consumer interests.<sup>256</sup> This statement compels a strong inference that the Committee intended the statute to apply retroactively to preexisting franchise agreements.<sup>257</sup> The language indicates that preex-

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255. H.R. CONF. REP. NO. 862, 102d Cong., 2d Sess. 77-78 (1992), *reprinted in* 1992 U.S.C.A.N. 1133, 1259-60 (emphasis added).

256. Remarks by then Senator Gore during floor debate are representative of this proposition. The Senator argued that the 1984 Cable Act "took away the ability of local governments to hold [cable] companies accountable." 138 CONG. REC. S421 (daily ed. Jan. 27, 1992) (statement of Sen. Gore). The result, argued Gore, was that municipalities could "still give a monopoly franchise but . . . can't protect [its] citizens." *Id.* at S422. Gore then asserted that this situation would be remedied by the 1992 Act, stating that: "If this bill passes, we will introduce competition for cable television companies and, . . . we will restore some ability for local governments to hold these companies accountable. No industry in this country should be in a situation where it has zero competition and zero regulation." *Id.* The ability of local governments to hold companies accountable is achieved in part by the ability to grant second franchises, thus facilitating competition.

257. The court in *James Cable* quotes the same passage, yet excludes the last three sentences. One can only speculate as to why the court did not address the import of the last three sentences of the passage. *James Cable Partners v. City of Jamestown*, 43 F.3d 277, 280 (6th Cir. 1995).

isting exclusive franchises were in the contemplation of the Conference Committee when enacting this provision.

In addition, the Senate Committee Report indicates that section 541(a)'s standard of "unreasonable refusal" must be determined according to the circumstances of the particular case. In the "Summary of Major Provisions," the Committee report provides some guidance for determining when a refusal to grant a second franchise is unreasonable.<sup>258</sup> The report states that "[i]t shall not be considered unreasonable for purposes of this provision for local franchising authorities to deny the application of a potential competitor if it is technically infeasible" although other legitimate reasons for denying an application may exist.<sup>259</sup> Technical infeasibility refers to such problems as installing a new cable grid. This explanation recognizes the justification for an exclusive franchise in the face of a First Amendment challenge—that of physical incapacity of the area to absorb another cable provider.<sup>260</sup>

The Committee statements comport with the general history of the development and regulation of the cable industry. Specifically, as cable was regulated due to the perceived "natural monopoly" status of the cable industry, consumer interests were presumably protected by such regulation.<sup>261</sup> However, because the 1984 Cable Act significantly limited rate regulation, circumscribed franchise fees, and provided for a presumption in favor of franchise renewal, consumer interests became less protected.<sup>262</sup> The history of the 1992 Cable Act indicates that the general purpose of the Act was to address the unregulated monopoly created by the 1984 Act.

To summarize, with the promotion of competition as the stated objective of the 1992 Act, Congress attempted to protect consumer interests by replacing the regulatory power lost by municipalities in the 1984 Act with managed competition. The elimination of exclusivity is an obvious prerequisite to attaining this goal. As demonstrated in Part A of this section of the Note, the interest in exclusivity is in general not sufficient to warrant protection from the retroactive application of section 541(a). Parts B and C make clear that the text and legislative history of the 1992 Cable Act to-

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258. S. REP. NO. 92, *supra* note 5, at 91, *reprinted in* 1992 U.S.C.C.A.N. at 1224.

259. *Id.*

260. See *supra* note 229 and accompanying text for a discussion of physical incapacity.

261. See *supra* note 32 and accompanying text.

262. See *supra* part I.A.3.

gether indicate that section 541(a) applies to preexisting franchise agreements.

D. *The "Unreasonable Refusal" Standard*

Section 541(a) states that a "franchising authority . . . may not unreasonably refuse to award an additional competitive franchise."<sup>263</sup> The statute does not explain when it would be unreasonable to refuse to award the additional franchise. In light of the legislative objectives of the Act and the circumstances incident to the cable industry, it is unreasonable to award an additional franchise when conditions exist in a particular case that warrant the protection of exclusivity, and rebut the presumption of retroactivity. The interest in exclusive cable franchises must therefore be determined on a case-by-case basis to discern whether the circumstances in a particular case make it unreasonable to grant an additional competitive franchise. This section briefly outlines several of the relevant factors to be considered.<sup>264</sup>

The date that the preexisting franchise agreement was entered into is relevant to several considerations. Whether the franchise was entered into before or after the 1984 Cable Act bears directly on the issue of the parties' reliance on the law. As noted, the 1984 Cable Act severely circumscribed the regulatory power of franchising authorities.<sup>265</sup> The unregulated monopoly enjoyed by many exclusive franchisees in the wake of the 1984 Act was a critical factor in the development of the new consumer protection measures enacted in the 1992 Act.<sup>266</sup> As such, exclusive franchises granted prior to 1984 are more likely to enjoy unregulated monopoly conditions, and are therefore more likely to be affected by section 541(a).

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263. 47 U.S.C. § 541(a)(1) (1994).

264. The section represents factors examined in this Note and is not intended to be exclusive of other potentially relevant factors. A case-by-case approach to determining the retroactivity of a statute has been adopted in another context by the United States Court of Appeals for the Second Circuit. In *Henley v. Slone*, 961 F.2d 23, 24 (2d Cir. 1992), the United States Court of Appeals for the Second Circuit addressed the question of whether the federal limitations period for securities fraud claims applied retroactively. The court held that, under the federal statute, the applicable limitations period must be determined case-by-case with regard to the law of retroactivity in the pertinent jurisdiction. *Id.* at 25-26. A case-by-case approach to deciding issues involving statutory provisions in general is common in the law. See, e.g., *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (motions for transfer of venue under 28 U.S.C. § 1404(a) require consideration of the facts on a case-by-case basis).

265. See *supra* part I.A.4 for a discussion of the effects of the 1984 Cable Act.

266. See *supra* part I.A.5 for a discussion of the market and regulatory conditions leading to the 1992 Act.

The length of time since the franchise was granted is also relevant to whether the franchisee has had an adequate opportunity to recoup its capital investment, or conversely whether the franchisee has not yet invested anything substantial enough to warrant protection. Given the large initial capital investment required to construct a cable system,<sup>267</sup> fairness requires that the franchisee be given adequate opportunity to realize earnings sufficient to cover its investment. Otherwise, many smaller cable companies might not have been willing to risk entering a particular market as they stand to lose their investment should a larger company decide to enter the market and compete. Conversely, where an award of a franchise has been so recent that the franchisee has not yet even begun to perform—i.e., has not yet invested in building the cable system—it may not be unreasonable to grant an additional franchise.<sup>268</sup>

The adequacy of consumer service will also be relevant to any determination of the reasonableness of refusing to grant an additional competitive franchise. The quality of service is particularly relevant in areas where a single cable provider has enjoyed a monopoly over the market. One of the principal adverse consequences resulting from the unregulated market conditions in the wake of the 1984 Act was the poor quality of consumer services.<sup>269</sup> Poor consumer services may be evidenced by the rate of increase in cable fees and the quality of customer service in general.

The physical capacity of the franchise area to absorb an additional cable system is also relevant to whether a refusal to grant an

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267. See *supra* part I.A.1 for a discussion of the capital intensive nature of the cable industry.

268. Admittedly, no situation may currently arise under the 1992 Act where there has been a recent grant of an exclusive franchise, as § 541(a) prohibits granting exclusive franchises. See *supra* note 69 for the text of the statute. However, this factor remains relevant in the current context where a franchise has been granted and soon thereafter a competitor applies for a franchise. Arguably, there is no reason to protect the first franchisee from the competition of the second where the first has not yet invested in the franchise.

On the other hand, the grant of a second competitive franchise may cause problems in light of the contractual expectations of the first franchisee. For instance, if the first franchisee is a smaller company and the second franchisee is a national company, the first franchisee may expect the second franchisee to attempt to undersell as a means of capturing a larger market share. See *supra* part I.A.1. Rather than building a cable system only to be subsequently forced out of the market, it would seem likely that the first franchisee would attempt to reach a rescission agreement with the franchising authority.

269. See *supra* part I.A.4 for a discussion of the negative effects of the “undue market power” possessed by cable franchises.



additional franchise would be unreasonable. Where the physical infrastructure of a community cannot support the installation of an additional cable grid, it would be reasonable to refuse to grant an additional franchise.<sup>270</sup> A related consideration is the disruptiveness inherent in installing an additional cable system. This consideration is particularly relevant where a community has recently undergone the disruption of having its streets unearthed and telephone lines reconfigured as a result of a new cable system. It would be arguably unreasonable to expect a community to repeatedly withstand such disruption within a short time period.

None of the preceding factors are dispositive of whether it would be unreasonable to grant a second franchise, and the summary given is not exclusive of other potentially relevant factors. The variance in circumstances from case to case will likely present an array of relevant factors. Section 541(a) requires that the court examine and weigh the competing factors present in the particular case and determine whether refusing to grant an additional franchise would be unreasonable in light of the general objectives of the 1992 Act—the promotion of managed competition and the protection of consumer interests.

### CONCLUSION

The *Cox* and *James Cable* decisions illustrate the problems inherent in traditional approaches to statutory construction. While these courts reached opposite conclusions on the question of the retroactivity of section 541(a), both courts approached the interpretation of the statute with essentially the same traditional methods of statutory construction. Thus, neither court adequately addressed the objectives of the statute in light of the historical circumstances incident to the cable industry, the legislative history, or the underlying interests that would be affected by the statute's retroactive application.

The *Landgraf* test, relied on by *James Cable*, similarly approaches the interpretation of statutes with traditional methods of construction. The question of whether section 541(a) of the 1992 Cable Act applies to preexisting exclusive franchises is not adequately resolved by the analytical framework delineated by the Supreme Court in *Landgraf*. The *Landgraf* test for retroactivity fails to account for relevant policy matters and historical circum-

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270. See *supra* note 229 and accompanying text for a discussion of the physical constraints faced by municipalities in granting additional franchises.

stances that are crucial to attaining the objectives of the 1992 Act. Thus, *James Cable*'s application of the *Landgraf* test resulted in a decision based on rules, rather than a construction based on the objectives of the 1992 Cable Act.

An interpretation of the statute based on practical reason addresses the underlying policy concerns of retroactivity in the cable context, and the legislative objectives of the 1992 Cable Act. This approach includes an examination of the text, legislative history, historical development of the cable industry and its regulation, and the underlying interests effected by a retroactive application of the statute.

The text of the Cable Television Consumer Protection and Competition Act demonstrates that the purpose of the Act is to remedy the situation created by the 1984 Cable Act—unregulated monopoly. The Act is designed to protect consumer interests harmed by the effects of unregulated monopoly by promoting managed competition. The legislative history illustrates that applying section 541(a) to negate preexisting exclusive franchises is consistent with the purpose of the Act. Thus, a presumption in favor of retroactive application exists, rebutted when it is unreasonable to grant a second franchise. Determining when it is unreasonable to grant a second franchise requires consideration of the effect that retroactive application will have on the underlying interests in the particular case, in light of the overall objectives of the Act. This case-by-case method of analysis under section 541(a) achieves the objectives of the Act by recognizing and responding to the variations in the cable industry.<sup>271</sup>

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271. The necessary question subsequent to any determination that exclusivity may be retroactively affected involves whether such a retroactive application of the statute is constitutional on Due Process grounds. This question is beyond the scope of this Note. However, the district court in *Cox* determined on remand that § 541(a) does not violate Due Process. *Cox Cable Communications, Inc. v. United States*, 866 F. Supp. 553, 557-58 (M.D. Ga. 1994). Given the relatively low standard of "minimum scrutiny" review applicable to retroactive application of a statute where economic rights are affected, it is clear that such retroactive applications will invariably be found constitutional. *See, e.g., General Motors Corp. v. Romein*, 503 U.S. 181, 191-92 (1992).